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No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF TENNESSEE, *Et al.*,
*Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
*Et al.*,
*Respondents.*

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Does Congress have the authority to exercise its power under the Commerce Clause (U.S. Constitution, Art. I, Sec. 8, Cl. 3), as limited by the Tenth Amendment, to supersede fundamental state governmental decisions in devising reasonable property taxation systems where those systems merely "affect" interstate commerce?

2. Was the congressional action in enacting Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 so as to displace a State's reasonable property tax classification system uniformly applicable to interstate and intrastate commerce arbitrary, inappropriate and without rational basis?

3. Do the provisions of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11503) abrogate Tennessee's property tax classification system embodied in the constitution and statutes of Tennessee with respect to rail transportation property subject to property taxation in Tennessee, and require the assessment and taxation of rail transportation property at levels or in manners other than those prescribed by Tennessee law?

4. If valid, is Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 applicable to the assessment and taxation of rail transportation property in Tennessee for the 1979 tax year?

## PARTIES

1. Petitioners are the State of Tennessee, the Public Service Commission of Tennessee; the Honorable Frank D. Cochran, the Honorable Z. D. Atkins, and the Honorable Keith Bissell, Members of the Public Service Commission of Tennessee; the State Board of Equalization of Tennessee; the Honorable Lamar Alexander, the Honorable Gentry Crowell, the Honorable Harlan Mathews, the Honorable Bob Tollett, the Honorable William R. Snodgrass, the Honorable David Walker, and the Honorable Bernice Crain, Members of the State Board of Equalization of Tennessee; and the Metropolitan Government of Nashville and Davidson County, Tennessee.

2. Respondents are the Louisville and Nasvhille Railroad Company; Clinchfield Railroad Company; Southern Railway Company; Alabama Great Southern Railroad Company; Central of Georgia Railway Company; Cincinnati, New Orleans and Texas Pacific Railway Company; Tennessee, Alabama and Georgia Railway Company; Tennessee Railway Company; Illinois Central Gulf Railroad Company; Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company; East Tennessee and Western North Carolina Railroad Company; Corinth and Counce Railroad Company; St. Louis Southwestern Railway Company; Chattanooga Station Company; Arkansas and Memphis Railway Bridge and Terminal Company; Chicago Rock Island and Pacific Railroad Company; and the United States of America.

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## PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Tennessee, on behalf of the State of Tennessee and the State Board of Equalization of the State of Tennessee, the General Counsel on behalf of the Public Service Commission of Tennessee, and the Metropolitan Legal Department on behalf of the Metropolitan Government of Nashville and Davidson County, Tennessee, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth Circuit was rendered on March 20, 1981, as attached hereto as *Appendix A*.

The reported opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, by the

Honorable Thomas A. Wiseman, Jr., presiding, is reported at *State of Tennessee* v. *Louisville and Nashville Railroad Company*, 478 F. Supp. 199 (M.D. Tenn. 1979).

## JURISDICTION

The judgment of the Court below was entered on March 20, 1981. This petition is timely filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution

2. The Tenth Amendment to the United States Constitution.

3. The Fourteenth Amendment to the United States Constitution.

4. 49 U.S.C. § 11503 [Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976]

5. Article II, Section 28 of the Tennessee State Constitution.

6. Tennessee Code Annotated §§ 67-601, 67-603, 67-901 and 67-902.

## STATEMENT OF THE CASE

On January 19, 1979, the petitioners filed a complaint in the United States District Court for the Middle District of Tennessee based upon jurisdictional grounds under 28 U.S.C. § 1331 and 28 U.S.C. § 1337 seeking a declaratory judgment to determine the extent and constitutional validity of any limitations contained in the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. § 11503), hereinafter referred to as the "4R Act," on the State of Tennessee, its agencies and its

political subdivisions in establishing, administering, carrying out or utilizing Tennessee's system of property taxation, particularly as it relates to the taxation of railroad property. Named as defendants were each of the interstate railroad companies operating into or through the State of Tennessee subject to the rules and regulations of the Interstate Commerce Commission and the laws of the State of Tennessee. On May 22, 1979, the United States of America moved to intervene and was made a party defendant for the purposes of defending the constitutionality of Section 306 of the 4R Act.

Under the provisions contained in Article II, Section 28 of the Tennessee State Constitution, Tenessee has established a property tax classification system. See Appendix C. For property tax purposes, the Tennessee Constitution requires property to be classified into three classes - real property, tangible personal property, and intangible personal property. The Tennessee Constitution further requires real property to be classified into public utility property, industrial and commercial property, residential property and farm property. Such subclassifications are assessed for property tax purposes at 55%, 40%, 25% and 25% of value, respectively. Tangible personal property is also sub-classified into public utility property, industrial and commercial property, and all other tangible personal property. This sub-classification is then assessed at 55%, 30% and 5% of value, respectively. The previously stated assessment ratios are specifically prescribed for each of the subclasses of property, and the Tennessee Legislature is empowered to provide the definition of property to be included in each class or subclass.

Pursuant to the constitutional mandate under Article II, Section 28 of the Tennessee Constitution, the Tennessee Legislature enacted a statute, T.C.A. § 67-601 [See Appendix D], providing definitions for property tax classification purposes. The Legislature defined the public utility property subclass as including the property of railroad companies. It also included in

the public utility property subclass the property of other carriers and transportation companies, including the following: telephone, radio common carriers and telegraph companies; passenger, sleeping, freight and private car companies; street car companies; power companies; express companies; pipeline companies; gas companies; electric light companies; water and/or sewerage companies; motor bus and/or truck companies; taxi cab, transit and limousine companies; commercial air carriers; and water transportation carriers. Such classification of railroad companies in the public utility property subclassification, rather than in the industrial and commercial property subclassification, was held to be in accord with the Fourteenth Amendment to the United States Constitution. *Louisville and Nashville Railroad Company* v. *Atkins,* 390 F. Supp. 576 (M.D. Tenn. 1975).

Under Tennessee statutes, the operating properties of railroad companies and other properties in Tennessee's "public utility property" classification are centrally assessed by the Public Service Commission using the unit rule of appraisal. T.C.A. §§ 67-901, 67-902. [See Appendix D] All other properties are locally assessed by local assessors of property.

On February 5, 1976, Congress enacted the 4 R Act (P.L. No. 94-210, 90 Stat. 54) [See Appendix D] under the ostensible authority of the Commerce Clause. In a part of this Act, specifically Section 306 thereof, Congress purported to regulate and control the governmental functions of the several states and their political subdivisions in matters of property taxation by directing the manner and mode of the assessment and taxation of "transportation property", "transportation property" being limited by definition to railroad property and property owned by the National Railroad Passenger Corporation. The principal features of Section 306 of the 4R Act are as follows:

1. It prohibited, as an unreasonable and unjust discrimination and an undue burden on interstate

commerce, the following acts by a state or political subdivision of the state.

a. The assessment for property tax purposes of railroad property at a value which bears a higher ratio to true market value than the ratio of assessed value to true market value of all other commercial and industrial property.

b. The levy or collection of any tax on an assessment which is unlawful under the act.

c. The levy or collection of any ad valorem property tax on railroad property at a tax rate higher than that generally applicable to commercial and industrial property in the same assessment jurisdiction.

d. The imposition of any other tax which results in discriminatory treatment of a railroad.

2. It provided a federal remedy for violations of the provisions of the Act.

3. It provided for a five percent (5%) margin of leeway and ratio before federal relief under the Act could be granted.

4. It provided that the burden of proof with respect to the determination of assessed value and true market value would be that declared by applicable state law.

5. It provided that the provisions of § 306 would not become effective until three (3) years from the date of enactment.

6. It provided a definitional paragraph specifically defining key terms used in the section.

The enactment of Section 306 on February 5, 1976, as a part of the 4R Act, represented the culmination of an effort by the

railroads to obtain federal legislation regulating state taxation of railroads with a view toward barring state tax policies and practices perceived as discriminatory against railroads.

The petitioners projected that if Section 306 of the 4R Act operated to displace Tennessee's property tax classification of railroad property as "public utility property," there would be a statewide annual property tax revenue loss, using 1978 tax rates, of $3,257,800.00. Petitioner Metropolitan Government of Nashville and Davidson County projected an annual property tax revenue loss, using 1978 tax rates, of $223,210.00.

From an order dated August 15, 1979, the United States District Court for the Middle District of Tennessee, the Honorable Tom A. Wiseman, Jr., presiding, ordered and declared that 49 U.S.C. § 11503 (Section 306 of the Railroad Revitalization and Regulatory Act of 1976) was constitutional, overrode Tennessee law to the extent that it was inconsistent therewith, and applied to the 1979 Tennessee tax year. In this order the District Court enjoined the 1979 tax assessment of rail transportation property by the State of Tennessee at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of "commercial and industrial" classified property in the same assessment jurisdiction has to the true market value of "commercial and industrial" classified property.

By timely notice of appeal, the petitioners herein appealed the order of the District Court of August 15, 1979, to the United States Court of Appeals for the Sixth Circuit. On March 20, 1981, the United States Court of Appeals for the Sixth Circuit affirmed the orders of the District Court. In its order, the Sixth Circuit Court of Appeals affirmed the ruling that Tennessee's classification of railroad property for tax purposes was in direct conflict with the provisions of Section 306 and thus must give way; that Section 306 did not infringe upon Tennessee's taxing power in violation of the Tenth Amendment; and that Section

306 affects Tennessee's property tax assessments of the 1979 tax year. The Court of Appeals relied upon three other court decisions in its order: *Atchison, Topeka & Santa Fe Ry. Co.* v. *Lennen,*[1] 640 F.2d 255 (10th Cir. 1981); *Atchison, Topeka & Santa Fe R.R. Co.* v. *State of Arizona,*[2] No. 78-655 (D.C. Ariz., filed Jan. 26, 1979) [See Appendix B]; *Great Southern R.R. Co.* v. *Eagerton,*[3] 472 F. Supp. 60 (M.D. Ala. 1979) *aff'd* 629 F.2d 1347 (5th Cir. 1980).

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[1] This case dealt only with a review of the district court's denial of the plaintiff railroads' motion for a preliminary injunction and did not address the merits of the case. Petitioners herein therefore feel this case inapplicable.

[2] This case is presently under advisement by the U.S. Court of Appeals for the Ninth Circuit, C.A. No. 79-3183. Petitioners would assert that the ruling of the District Court of Arizona on the 4R Act as applied to Arizona's property tax classification system is distinguished by a comparison of the Arizona and Tennessee statutes. Tennessee has four real property classifications with railroad property included as public utility property and assessed at 55% of value while commercial and industrial property, not included in the public utility classification, is assessed at 40% of value. Arizona on the other hand has seven real property classifications with railroads included within a narrowly defined class one and assessed at 60% of value while commercial and industrial property in general is included within class three and assessed at 27% of value. A.R.S. § 42-136. The assessment on railroads vis-a-vis commercial and industrial property in general is much higher in Arizona.

[3] This case dealt only with the issue of which tax year in Alabama the 4R Act had first application and did not address the remaining issues raised by petitioners herein.

## REASONS FOR GRANTING THE PETITION

### I.

**The Mode And Structure Of The State Taxing System Is An Integral Function Of State Government As Protected By The Tenth Amendment Under The Authority Of The *National League Of Cities* v. *Usery*.**

This case presents the important and fundamental question of a State's sovereignty and dignity within the federal system as it relates to the ability of the State to set and impose a reasonable tax system without the dictates or intervention of the federal Congress.

It is well established that Congress has broad power under the Commerce Clause to regulate commerce among the states *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824). However, the congressional exercise of power under the Commerce Clause is not without limitation when it confronts other constitutional provisions. *E.g. Leary* v. *United States*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969); *United States* v. *Jackson*, 390 U.S. 570, 20 L.Ed.2d 138, 88 S.Ct. 1209 (1968).

Furthermore, under the Commerce Clause, Congress has the right to regulate commerce among the states but this is not an unfettered right, but is subject to the attributes of sovereignty retained by the states under the Tenth Amendment.

In *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976), the United States Supreme Court determined that the Tenth Amendment was a limitation on the congressional exercise of power under the Commerce Clause. Quoting from *Fry* v. *United States*, 421 U.S. 542, 44 L.Ed.2d 363, 95 S.Ct. (1975), the Court, speaking through Mr. Justice Rehnquist, said:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not

been surrendered,' . . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the State's integrity or their ability to function effectively in a federal system." 96 S.Ct. at 2470.

The Court went on to develop this idea as follows:

"It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority of that matter." 96 S.Ct. at 2471.

The Court further said:

"But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce . . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 96 S.Ct. at 2475-2476

In applying these principles, the Court struck down as an unconstitutional exercise of congressional power under the Commerce Clause, the extension of the Fair Labor Standards Act to employees of states and their political subdivisions. The Court held that

> "[I]nsofar as the challenged amendments [to the Fair Labor Standards Act] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted to Congress by Art. I, § 8, cl. 3." 96 S.Ct. at 2474

The power to tax, particularly the power to tax property located within its boundaries, is an essential and basic attribute of state sovereignty and it is a traditional function central to the raising of revenue to provide for the performance of basic governmental services. *See, Nathan* v. *Louisiana,* 8 How. (49 U.S.) 73 (1850); A. Hamilton, *The Federalist,* No. 33 (J. Cooke Ed. 1961). Such power to tax is limited only if in substance and effect it constitutes the exertion of a different and forbidden power. *Bold* v. *Barrett,* 344 U.S. 583, 97 L.Ed. 567, 73 S.Ct. 468 (1953).

The constitutional limitations upon the State's power to tax are contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the prohibition of taxing interstate commerce under the Commerce Clause, Article I, Section 8, Clause 3. Tennessee's system of taxing railroads has been contitutionally upheld in *Louisville and Nashville Railroad Co.* v. *Atkins,* 390 F. Supp. 576, 579 (M.D. Tenn. 1974). *Also see, Nashville C & St. L. Ry. Co.* v. *Browning,* 310 U.S. 362, 82 L.Ed. 1254, 60 S.Ct. 968 (1940). There have been no allegations in this case that Tennessee is taxing interstate commerce since it only seeks to tax railroad property located within the jurisdictional boundaries of the state.

The power and structure of the state taxing system is an integral function of state government as protected by the Tenth Amendment and would come within the "one dimensional state interest test" applied by the Supreme Court in *National League of Cities* v. *Usery, supra, i.e.,* whether on its face a particular activity is "an integral function of state government."

However, the District Court discarded the "one dimensional state interest test" of the plurality decision in *National League of Cities* v. *Usery, supra,* and applied the balancing of federal and state interest approach deemed by the District Court to be implicit in *National League of Cities.* In applying this balancing approach, however, the District Court concluded that Congress' effort to revitalize the railroad industry overrides the state's interest in maintaining a property tax classification system, basing this conclusion on the premise that Congress, in Section 306, did not directly dictate to the states how essential decisions concerning integral governmental functions should be made because the States were free to collect the same amount of revenue by other means.

By its application of a balancing approach, the District Court, and as affirmed by the Court of Appeals, failed to place in the balance the States' interest in sovereignty and the federal system in general. Rather, the District Court apparently omitted these factors from the balancing process and assumed that because Congress had under the Commerce Clause acted to "revitalize" a private industry, it automatically outweighed the State's sovereign right to maintain a reasonable property tax classification system. Although arguably the States may be free to collect revenue by means other than a classified property tax system, they have an interest in maintaining the policy choices embodied in reasonable tax systems. These policies should not be automatically overriden by Congress in revitalizing a segment of private industry because Congress, too, is free to choose less intrusive means of accomplishing this purpose. The petitioners maintain that at a minimum the *National League of Cities* decision requires the principles of state sovereignty and federalism to be placed in the balance on the side of the States in applying a balance of interests approach.

If Congress can regulate through the Commerce Clause the States' activities merely "affecting" interstate commerce, virtually every governmental activity of the States may be

regulated. Taxes are the life-blood of a state. If Congress has the power to say how the States can tax property clearly within the States' jurisdiction and nexus, Congress has the power to destroy the States. If the State's taxing power is assumed by the Commerce Clause, the State is emasculated and superfluous becoming functionally a gutted shell. The petitioner would submit that using the rationale of the *National League of Cities* case, Congress, by Section 306, has encroached upon the basic sovereignty guaranteed the States under the Tenth Amendment.

II.

**The Congressional Action Of Enacting Section 306 Of The 4R Act Was Arbitrary, Inappropriate And Without Rational Basis To Support Its Encroachment Upon The Sovereignty Of The State.**

In enacting Section 306 of the 4R Act, Congress simply declared certain taxing actions by a state or political subdivision of a state "to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." Such a de facto announcement that certain actions constitute an unreasonable and unjust discrimination against and an undue burden on interstate commerce is arbitrary and unreasonable and without rational basis. For Congress to declare that a reasonable ad valorem property tax system which does not discriminate between interstate and intrastate commerce nor discriminate nor unduly burden interstate commerce is arbitrary and without rational basis is in and of itself arbitrary and without rational basis. In *Hewlett - Packard Co.* v. *Barnes,* 425 F. Supp. 1294 (N.D. Cal. 1977), it was noted that constitutionality of federal legislation under the Commerce Clause is determined by a two-part test: (1) Congress must have a rational basis to find that the regulated activity affects interstate commerce, and (2) must select a means of regulation reasonable and appropriate to achieve that end.

Congress has seemed to equate property classification distinctions between classes of property within a States' classification system and interstate commerce burdens and discriminations. Congress has arbitrarily elevated intrastate property tax classifications to interstate burdens and discrminations even though intrastate and interstate commerce may be treated the same way under the tax system. Under this application, a state with a prohibited classification system under Section 306 is deemd, without more, to have discriminated against and unduly burdened interstate commerce notwithstanding whether or not rail transportation property and assessment ratios under that classification system, when compared to those of other states, reflect greater or lesser assessment ratio applications. Thus even though Tennessee's system treats interstate and intrastate commerce alike, it classifies rail transportation property in the same manner as other carriers and transportation property, and implies an assessment ratio well within the range of ratios employed in other states, its system is deemed by Section 306 to be discrminatory and unduly burdensome on interstate commerce. There appears to be no rational basis for Congressional rescitation to this effect in Section 306 or for the District Court's observation that "it can be asserted with equal force that Tennessee's taxation of railroads at a higher rate than property within its commercial and industrial classification seriously impairs the flow of interstate commerce."

Even if the States' property tax classifications are deemd to "affect" interstate commerce in a broad economic sense, *McGoldrick* v. *Berwind - White Coal Mining Co.*, 309 U.S. 33, 84 L.Ed.2d 565, 60 S.Ct. 388 (1940), petitioners maintain that Section 306 does not represent a reasonable and appropriate means of revitalizing the railroad industry. As reflected in the proof, discriminatory property taxation is unsubstantial to the railroads to the point of being negligible in its economic impact on railroads nationally. Moreover, Section 306 does not represent a reasonable and appropriate means of regulation to ac-

complish the removal of discrimination in property taxation. Section 306 fails to distinguish between discrimination which occurs because of differences in tax policy and discrimination which results from the unequal application of the laws. Section 306 in and of itself actually legislates discrimination because it singles out rail transportation property for discriminatory tax treatment favorable to rail carriers and not available to other interstate contract and common carriers. Petitioners would adamantly submit to this Court that Congress in enacting Section 306 has selected a means of regulation which interferes seriously with the sovereign taxing powers of the state in order to achieve minimal and unsubstantial ends. Petitioners assert that such a means of regulation is neither reasonable nor appropriate.

## III.

**Both The District Court And The Court Of Appeals Have Misconstrued The Application Of The 4R Act Vis-A-Vis The Constitution Of The State Of Tennessee.**

The federal Congress does not have the authority under the Commerce Clause as limited by the Tenth Amendment to supersede a fundamental and reasonable system to taxation in the State of Tennessee. The primary feature of Section 306 in the context of Tennessee's property tax classification system, is 49 U.S.C. § 11503(b)(1) which provides that a state or political subdivision of a state may not "assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property."

The term "commercial and industrial property" as used in Section 306 is defined in 49 U.S.C. § 11503(a)(4) as follows:

". . .property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted, to a commercial or industrial use and subject to a property tax levy."

The definition of "commercial and industrial property" under Section 306 is not synonymous with Tennessee's definition of "industrial and commercial property" as contained in T.C.A. § 67-601(8). [See Appendix D] Rather, "commercial and industrial property" under Section 306 is a much broader class of property than "industrial and commercial property" under Tennessee's definition of "public utility property." T.C.A. § 67-601(7). [See Appendix D] Thus, rail transportation property is not asessed at a higher ratio to true market value than the assessment of all other commercial and industrial property in the State of Tennessee. Much of the property defined in the 4R Act as "commercial and industrial property" would also include property presently classified as "public utility property" in Tennessee. Tennessee's classification system as provided in Article II, Section 28 of its constitution affords railroads equal tax treatment with other, but not all, commercial and industrial property. Equal tax treatment is afforded the railroads with, for example, telephone, radio common carriers, and telegraph companies, passenger, sleeping, freight and private car companies, pipeline companies, gas companies, electric light companies, water and sewerage companies, motor bus and truck companies, taxicab, transit, and limousine companies, commercial air carrier companies, water transportation carrier companies as set forth in T.C.A. § 67-601(7). The railroad industry is but one of many industries in the "public utility" classification.

Under the petitioners' interpretation of the application of the 4R Act, the railroads are assessed equally with "other commercial and industrial property" in the same assessment jurisdiction and most importantly gives it equal tax treatment with its competitors. However, under the District Court's and the Court of Appeals' interpretation of the application of the 4R Act, the

railroads are now favored in the application of the property tax in Tennessee over some of its very competitiors.

Such an interpretation as advanced by the petitioners would avoid any constitutional questions as set forth in the previous parts of this petition.

## IV.

**Section 306 Of The Railroad Revitalization And Regulatory Reform Act Of 1976 Does Not Act To Displace January 1 As The Assessment Date In Tennessee For The 1979 Tax Year.**

Section 306 of the 4R Act provides that "the provisions of this section shall not become effective until 3 years after the date of enactment of this section." The 4R Act was established by law when it was signed by the President on February 5, 1976 Therefore, in accordance with its terms, Section 306 became effective on February 5, 1979.

Tennesse by T.C.A. § 67-603 has established that all assessments of real property and personal property are made annually and as of January 1 for the year to which the assessment applies. *See generally, Mid-State Baptist Hospital, inc.* v. *City of Nashville,* 211 Tenn. 599, 366 S.W.2d 769 (1973). The District Court, as affirmed by the Court of Appeals, however, found Section 306 of the 4R Act to be applicable to the 1979 Tennessee tax assessments by virtue of the doctrine of preemption.

The doctrine of preemption is applicable in three basic instances: (1) where an express preemption provision exists in the federal act, *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624, 36 L.Ed.2d 547, 93 S.Ct. 1854 (1973); (2) where preemption may be implied because of a direct repugnance or conflict between the federal and state statutes such that the two acts cannot be reconciled or consistently stand together, *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 10

L.Ed.2d 248, 83 S.Ct. 1310 (1963); and (3) where preemption may be implied because the state statutes stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, *Wray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 55 L.Ed.2d 179, 98 S.Ct. 988 (1978).

The petitioners would respectively maintain to the Court that none of these basic instances exist with respect to Tennessee's "tax day" as established on January 1 by T.C.A. § 67-603. The federal act, contains no express declaration specifically preempting January 1 as the date of assessment in the State of Tennessee. There is no irreconcilable conflict between Section 306 and T.C.A. § 67-603 describing Tennessee's "tax day" as January 1. If the application of Section 306 is deemed to effect rail transportation property assessments in Tennessee on January 1, 1980, such an interpretation would avoid any conflict between Section 306 and T.C.A. § 67-603.

Because the effective date of Section 306 is directly dependent upon the timing of its passage by Congress and its signature by the President, there appears to be no congressional intent to make Section 306 applicable to any specific tax year. If Congress intended Section 306 to apply to a particular tax year, it could have employed simple and plain language to this effect.

As stated the object and purpose of Section 306 is to preclude disparate treatment between rail transportation property and other commercial and industrial property in state and local property taxation. It had no purpose or objective to set a day other than those prescribed by state law upon which tax rights and liabilities are to be determined. Section 306 was national legislation, purporting to place limits upon state and local taxation of rail transportation property in all states. Presumptively, Congress was aware of the diverse content of the property tax provisions of the several states. Yet Congress employed no language in Section 306 specifying a special uniform "tax day" with respect to the taxation of rail transportation property.

Moreover, T.C.A. § 67-603 setting January 1 as the "tax day" in Tennessee does not stand as an obstacle or affect at all the effective date of Section 306.

The petitioners would respectively submit to the Court that the District Court, as affirmed by the Court of Appeals, construed and applied the doctrine of preemption too broadly under the Supremacy Clause in that none of the traditional three tests as set forth by the Supreme Court were met with respect to this question.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

NO. 79-1515

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Tennessee, et al.,
Plaintiffs-Appellants,

v.

Louisville and Nashville Railroad Company, et al.,
Defendants-Appellees.

(Filed March 20, 1981)

Before: EDWARDS, Chief Judge; KENNEDY and Jones, Circuit Judges.

Plaintiffs sought a declaratory judgment to construe the application of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 26(c), to Tennessee's system of taxation of its railroad property and alternatively, to determine its constitutionality, if not construed as plaintiffs contend. Seciton 306 prohibits assessment of railroad property at a value which bears a higher ratio to true market value than the ratio utilized by the state in assessing other commercial and industrial property. It further prohibits the levy or collection of any *ad valorem* property tax on railroad property at a tax rate higher than that generally applicable to commercial and industrial property in the same assessment jurisdiction. Tennessee classifies railroad property along with the property of other utilities, carriers and transportation companies as "public utility property" and assesses it at 55% of value. Other commercial and industrial property is classified and assessed at 40% of value for real property and 30% for personal property. The

State of Tennessee, its Public Service Commission, and State Board of Equalization, along with the Metropolitan Government of Nashville and Davidson County, claimed that Section 306 does not prohibit Tennessee's present property taxation scheme and, if it does, it violates the Tenth Amendment of the United States Constitution.

The District Court, per Judge Thomas A. Wiseman, Jr., disagreed, granting defendants' motion for summary judgment. Judge Wiseman found that Tennessee's classification of railroad property for tax purposes was in direct conflict with the provisions of Section 306 and thus must fall; that Section 306 does not infringe upon Tennessee's taxing powers in violation of the Tenth Amendment; and that Section 306 affects Tennessee's property tax assessments for the 1979 tax year. The Court concludes that the decision of the District court is correct and in accord with the decisions of other circuits. *Atchison, Topeka & Santa Fe Ry. Co., et al.* v. *Lennen,* No. 80-2299 (10th Cir., filed Jan. 23, 1981); *Arizona, et al.* v. *Atchison, Topeka & Santa Fe Ry. Co., et al.,* No. 78-655 (D.C. Ariz., filed Jan. 26, 1979); *Alabama Great Southern R.R. Co.* v. *Eagerton,* 472 F. Supp. 60 (M.D. Ala. 1979), *aff'd* 629 F.2d 1347 (5th Cir. 1980).

Accordingly, the judgment is affirmed for the reasons set forth in the opinion of the District Court entered August 15, 1979.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 78-655 Phx. WPC

State Of Arizona, *et al.*,
Plaintiffs,

vs.

Atchison, Topeka And Santa
Fe Railroad Co., *et al.*,
Defendants.

## MEMORANDUM AND ORDER

The State of Arizona and the Arizona Department of Revenue (hereinafter "Arizona") seek a declaration that section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Section 306"), 49 U.S.C. & 26(c), either does not prohibit Arizona's present property taxation scheme or does violate the Tenth Amendment of the United States Constitution. The originally named defendants are two railroad companies, the Atchison, Topeka And Santa Fe Railroad Company ("Santa Fe") and the Southern Pacific Company ("Southern Pacific"). The United States Government has intervened as a party defendant subsequent to the filing of the complaint.

Arizona's present property taxation system divides property into six classes. See A.R.S. § 42-136. The assessed valuation of property varies from fifteen percent of the property's full cash value or market value to sixty percent of the property's full cash value. See A.R.S. § 42-227. All real and personal property of railroad and certain other property fall into class one. A.R.S. § 42-136(A)(1). Class one property is taxed at the highest assessed value rate, sixty percent of its full cash value. Section 306, however, reads:

(1) Notwithstanding the provisions of section 306(b) of this title, any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such state or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this chapter.

49 U.S.C. § 26(c)(1).

Defendants Santa Fe and Southern Pacific and plaintiff Arizona have stipulated that under A.R.S. § 42-227(B)(1) the

transportation property of the defendant railroads is assessed at a ratio of assessed value to true market value which exceeds by at least five percent the average ratio of assessed value to true market value of all other commercial and industrial property and also at a higher ratio to the true market value of such transportation property than the average assessed value in all property in Arizona. The plaintiff has moved for summary judgment contending that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Each of the three defendants has responded by separately moving for summary judgment. The three primary issues of law raised by Arizona's motion and the defendants' cross-motions can be summarized as follows: (a) whether this Court has jurisdiction over an actual controversy; (b) whether section 306 applies to Arizona'a property taxation scheme; and, (c) whether section 306 is a constitutional exercise of Congressional power.

## I. Jurisdiction

The question of jurisdiction involves two sub-issues: whether a basis for federal jurisdiction exists and whether the alleged controversy is ripe for adjudication. The Railroad Revitalization and Regulatory Reform Act provides in part:

> [T]he district courts of the United States shall have jurisdiction without regard to amount in controversy or citizenship of the parties, to grant . . . declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section except that —
>
> . . . .
>
> (b) the provisions of this section shall not become effective until 3 years after February 5, 1976.

49 U.S.C. § 26(c)(2)(b). Thus, the substantive right not to be discriminated against property tax-wise and the procedural right to vindicate that right in federal court does not become effective

until after February 5, 1979. Even if these rights were presently effective, Arizona presumably could not allege jurisdiction based on 49 U.S.C. § 26(c) as it is not seeking to prevent, restrain, or terminate any acts in violation of Section 306.

The plaintiffs, however, have alleged jurisdiction under 28 U.S.C. § 1331 and § 1337. Section 1331(a) grants district courts jurisdiction of all cases "aris[ing] under the Constitution, laws, or treaties of the United States" wherein the matter in controversy exceeds $10,000, while section 1337 confers on district courts jurisdiction of all cases "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Defendant Santa Fe has suggested that the plaintiffs case might not arise under the Constitution and laws of the United States. While it is true that a federal question must appear on the face of the complaint, and the federal question cannot be created by anticipating a defense that a defendant will raise, *Louisville & Nashville R.R. Co.* v. *Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908), a declaratory judgment action seeking to establish the invalidity of a threatened claim based on federal law arises under federal law for purposes of establishing federal question jurisdiction. *Arden-Mayfair, Inc.* v. *Louart Corp.*, 434 F. Supp. 580, 584 (D. Del. 1977). *See also Tokyo Shibaura Elec. Co. Ltd.* v. *Zenith Radio Corp.*, 548 F.2d 88 (3d Cir. 1977) (plaintiff sought declaratory judgment of invalidity of patent). The rights of railroads based on section 306 provide the basis for a cause of action and are not merely a federal defense to a threatened proceeding based on state law. *Compare Allegheny Airlines, Inc.* v. *Pennsylvania Public Utility Comm.*, 465 F.2d 237 (3d Cir.), *cert. denied,* 410 U.S. 943 (1972) (federal district court did not have federal question jurisdiction in a declaratory judgment action when the federal issue would constitute only a defense to threatened state action). Moreover, Arizona seeks to declare section 306 unconstitutional under the Tenth Amendment, clearly a question arising under the Constitution and laws of the

United States. The complaint is distinguishable from that in *Gully* v. *First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), in that Arizona is not arguing that a federal law gives it the right to tax an entity which was found not to raise a federal question, but that federal law prohibits Congress from attempting to restrict its right to tax. The federal law in *Gully, supra*, was characterized as "renouncing a defense" of the taxpayer, while section 306 plainly creates a cause of action for the taxpayer, and the Tenth Amendment is argued by Arizona to provide a cause of action here. As the allegation by Arizona as to the amount in controversy has not been controverted, and as Section 306 obviously affects interstate commerce, jurisdiction based on either 28 U.S.C. § 1331 or § 1337 is sufficiently established.

Arizona also maintains that the action is ripe for adjudication and the defendants either concur or simply raise the question of ripeness without alleging that it is lacking here. For a federal court to grant declaratory relief, there must be an actual controversy presented for adjudication. 28 U.S.C. § 2201. What constitutes an actual controversy cannot be decided by applying a clear-cut rule. As Justice Murphy stated in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941):

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

That Section 306 will not become effective until February 5, 1979 does not mean that a judicial controversy based on Section 306 cannot now exist. *See, e.g., Blanchette* v. *Connecticut General Ins. Corp.*, 419 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."); *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (adjudication of the constitutionality of a public act prior to its effective date). Doubt of future contingencies should not automatically mean a controversy cannot be ripe for adjudication. Rather, "the practical likelihood that the contingencies will occur and that the controversy is a real one should be decisive in determining whether an actual controversy exists." 10 C. Wright & A. Miller, Fed. Prac. & Proc. § 2757 at 760 (1973). The probabilities that the Arizona legislature might change its property taxation scheme or that Congress might repeal Section 306 seem quite low. Since Section 306 was passed nearly three years ago neither legislative body has apparently considered any proposal that would avoid this controversy. The contingencies that Arizona will not collect the property tax as it now exists or that the defendant railroads will not protest the collection of such taxes based on Section 306 seem also quite improbable, especially in light of stipulated facts. Thus it is concluded that the controversy alleged here is ripe for adjudication.

## II. Statutory Construction of Section 306

Section 306 provides that the ratio of assessed value to the true market value of railroad property cannot, in essence, be higher "than the ratio which the assessed value of all other commerical and industrial property in the same assessment jurisidiction bears to the true market value of all such other commercial and industrial property." 29 U.S.C. § 26(c)(1)(a). Arizona argues that the phrase "all other commercial and industrial

property" refers to a single category such that all property in this category is assessed at the same percentage of market value. However, the language of Section 306 does not expressly require that a property tax scheme divide commercial and industrial property only according to whether or not it is railroad property so that all commercial and industrial property that is not railroad property is assessed at the same percentage of market value. To so read Section 306 makes the application of the statute extremely narrow to the point of being meaningless.

Legislative history shows that the purpose of the Railroad Revitalization and Regulatory Reform Act was "to promote the revitalization of the railroad industry in the United States." 1976 U.S. Code, Cong. & Admin. News 14, 15. One of the major problems identified by Congress was the inadequate financial resources of the railroads to improve and modernize rail facilities. *Id.* The connection between inadequate financial resources and discriminatory taxation is not remote. Legislative history of proposals that were considered prior to the enactment of Section 306 and that closely mirror the language of Section 306 is insightful.

> The purpose of S. 2289 is to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation of common and contract carrier transportation property.
>
> . . . .
>
> In the last 9 years, the railroads alone have been assessed more than $900 million in discriminatory taxes.
>
> . . . .
>
> The Department of Transportation [has] stated:
>
> > There is little question as to the existence of discriminatory property tax practices against railroads. . . . Since, generally, they are only remotely

> related to the economic performance of the carrier, property taxes have a regressive effect on the carriers financial posture and earnings which, because of intermodal competition, cannot always be passed along. Even when allowance is made for the real prospect that the states will find other ways to raise revenue from the carriers to offset revenue losses, enactment of S. 2289 would seem to be of positive benefit to the regulated surface transportation industry.

S. Rep. No. 91-630, 91st Cong. 1st Sess. 1, 3, 4 (1969). The Senate Report goes on to cite evidence of nineteen states in which there was material tax discrimination. The assessed value ratio averaged nearly 38 percent higher for railroad property than for all other property. Arizona was the third worst of the nineteen states analyzed. *Id.* at 5. It is thus not unreasonable to conclude that an intermediate purpose of Section 306 is to eliminate discriminatory property taxation. To adopt the narrow construction of Section 306 proposed by Arizona would certainly defeat that purpose because of the ease with which the application of Section 306 could be avoided.

Legislative history of earlier proposed legislation very similar to Section 306 also strongly suggests that the phrase "all other commercial and industrial property" should be read as all other commercial and industrial property in the aggregate, regardless of how particular types of commercial and industrial property are classified for tax assessment purposes.

> For simplicity, . . . the phrase "all other property in the taxing district" has been used as the equivalent of the property of the "average" taxpayer there. Thus the words "all other property" are to be construed as meaning property in the aggregate, and not individually as separate parcels or kinds of property.

S. Rep. No. 1483, 90th Cong. 2d Sess., Appendix C, at 23 (1967). Thus, based on the language of Section 306 and the legislative history cited and quoted, Arizona's narrow construction of Section 306 must be rejected.

### III. Constitutionality of Section 306

Arizona argues that Section 306 infringes upon its taxing power in violation of the Tenth Amendment, citing *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), in particular. Arizona, however, misconstrues the impact of *National League of Cities* on the power of Congress under the Commerce Clause.

It cannot be disputed that Congress has a very broad power to regulate interstate commerce and those activities affecting interstate commerce. *See, e.g., Fry* v. *United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations."); *Wickard* v. *Filburn*, 317 U.S. 111, 124-25, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942) ("Even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726 (1942) ("The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."); *Houston, E. & W. T. Ry.* v. *United States*, 234 U.S. 342, 352, 24 S.Ct. 833, 58 L.Ed. 1341 (1914) ("[I]t is Congress, and not the state, that is entitled to prescribe the final and dominant rule [an interstate matters], for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."); *Gibbons* v.

*Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824) ("[T]he power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.").

The Supreme Court has indicated in dicta that the power of Congress under the Commerce Clause includes the power to control state taxation affecting interstate commerce. *See, e.g., State Board of Insurance* v. *Todd-Shipyards Corp.*, 370 U.S. 451, 456, 82 S.Ct. 1380, 1384, 8 L.Ed.2d 620 (1962) ("The power of Congress to grant protection to interstate commerce against state regulation or taxation [citations omitted] or to withhold it [citations omitted] is so complete that its ideas of policy should prevail."); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 679, 65 S.Ct. 870, 883, 89 L.Ed. 1252 (1945) ("Congress, through the commerce clause, possesses the . . . power of control of state taxation of all merchandise moving in interstate commerce or foreign commerce."); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 298, 64 S.Ct. 950, 953, 88 L.Ed. 1283 (1944) ("Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude the domiciliary State from authority which it otherwise would have because it is the domiciliary State."). Justice Jackson's concurring opinion in *Northwest Airlines, supra*, is noteworthy where he stated:

> Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so.

*Id.* at 303-04, 64 S.Ct. at 956.

Arizona cites three relatively old Supreme Court cases, *Nathan* v. *Louisiana*, 49 U.S. (8 How.) 3, 12 L.Ed. 992 (1850), *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 19 L.Ed. 101 (1868), and *Railway Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5, 21

L.Ed. 787 (1873), for the proposition that the power of taxation by a state cannot be impaired or abridged by any federal power under the Constitution. Those cases, however, did not involve any finding that a state tax was an undue burden on interstate commerce, and there was no Congressional legislation that clearly purported to preempt the state tax law in question. Moreover, the following recent statements by the Supreme Court subsequent to its decision in *National League of Cities, supra,* are inconsistent with the proposition that a state's power to tax is limitless:

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all states to adhere to uniform [taxation] rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.

*Moorman Manufacturing Co.* v. *Bair,* ____ U.S. ____, 98 S.Ct. 2340, 2347-48 (1978).

Of course, a state can regulate certain matters affecting interstate commerce, absent congressional preemption, if the burden on interstate commerce is not adjudicated to be excessive. *See, e.g., Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Cooley* v. *Board of Wardens,* 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851). However, that certain state regulation is found not to unduly burden interstate commerce does not preclude Congress from preempting such regulation. *See generally, Southern Pacific Co.* v. *Arizona, supra,* 325 U.S. at 769, 65 S.Ct. at 1520 ("Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce."). Thus, the argument made by Arizona that its property taxation

scheme was found not to be unconstitutional as an undue burden on interstate commerce in *Apache County* v. *Atchison, Topeka & Santa Fe R.R. Co.*, 106 Ariz. 356, 476 P.2d 657 (1970), (decided prior to enactment of the federal statute in question), is irrelevant. The reasoning of the Oregon Supreme Court in *Smith, Kline & French Lab.* v. *State Tax Comm'n*, 241 Ore. 50, 403 P.2d 375 (1965), appears both eminently sound and directly relevant to analyzing the power of Congress to enact Section 306. The Oregon Supreme Court stated in *Smith, Kline, supra:*

> A state can levy an income tax upon revenues derived from interstate commerce. This is not becauase such tax is in a different area than the congressional power "to regulate commerce"; it is because, in the absence of congressional action to the contrary, both the state and federal legislatures can legislate in this area. In the absence of congressional action to the contrary, the only restriction upon the states is judicially imposed,—state action must not *unduly* burden interstate commerce. Congress now has acted; its statute is contrary to the state action; the federal statute is valid and the state statute must yield.

241 Ore. at ____, 403 P.2d at 380.

Arizona has strongly urged that *National League of Cities, supra,* requires finding Section 306 unconstitutional because Congress does not have the authority under the Commerce Clause to enact such legislation. *National League of Cities* invalidated an amendment to the Fair Labor Standards Act that was to include most state and municipal employees within the scope of the minimum wage and hour provisions of the act. A plurality of the Court stated:

> We hold insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions,

> they are not within the authority granted by Congress by Art. I. § 8, cl. 3.

*Id.* at 852, 96 S.Ct. at 2474. Four justices dissented from the Court's opinion and Justice Blackmun concurred on the basis that the opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856, 96 S.Ct. at 2476. Lower federal courts have interpreted *National League of Cities* very narrowly. *See, e.g., Usery* v. *Dallas Independent School District,* 421 F. Supp. 111, 114 (N.D. Tex. 1976). The number of cases upholding the Equal Pay Act provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1), illustrate the markedly conservative application of the holding in *National League of Cities. See, e.g., House* v. *Stewart,* Civ. No. C-77-181-G (M.D. N.C. Jan. 6, 1977), *aff'd,* 577 F.2d 734 (4th Cir.), *cert. denied,* 47 U.S.L.W. 3368 (1978); *Usery* v. *Dallas Independent School District, supra.*

Assuming that state taxation is an integral governmental function, the concurring opinion of Justice Blackmun indicates an ad hoc balancing of federal and state interests is to be used in resolving whether federal legislation restricting state power is constitutional under the Commerce Clause. Eliminating or reducing discriminatory taxation of railroads to enhance the chances of revitalizing the railway industry is an important federal interest in that the railway industry is a very important component of the interstate commerce system. The problems of this industry appear to be susceptible to solution only on a national scale. On the other hand, the state's interest in obtaining tax revenues in a particular, discriminatory way is difficult to discern. It is important to note that Section 306 does not prevent the states from collecting the same amount of revenue as in the past by means other than a property tax scheme highly discriminatory to railroad companies. Restricting how a state

collects taxes, moreover, does not as directly or substantially affect the policy choices a state makes as does restricting how collected taxes are to be spent, which was involved in *National League of Cities*. Thus, it is concluded on balance that Section 306 does not force directly upon the states Congressional choices as to how essential decisions regarding the conduct of integral government functions are to be made.

Finally, in refusing to adopt the construction of Section 306 proposed by Arizona and in finding Section 306 constitutional, this Court is not assessing or levying any tax, which is prohibited by the holding in *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961). Therefore,

IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendants' motions for summary judgment are granted.

3. Counsel for defendants will promptly submit a single form of judgment consistent with the foregoing and approved as to form only by counsel for plaintiffs.

DATED January 26, 1979.

United States District Judge

## APPENDIX C

Art. I, Sec. 8, Cl. 3

*Powers of Congress.*— [1] The congress shall have power to . . .

. . .

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Tenth Amendment

*Rights reserved to states or people.*— The powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Art. II, Sec. 28. Taxable property—Valuation—Rates.**—In accordance with the following provisions, all property real, personal or mixed shall be subject to taxation, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except the direct product of the soil in the hands of the producer, and his immediate vendee, and the entire amount of money deposited in an individual's personal or family checking

or savings accounts. For purposes of taxation, property shall be classified into three classes, to wit: Real Property, Tangible Personal Property and Intangible Personal Property.

Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) percent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) percent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) percent of its value.

House trailers, mobile homes, and all other similar movable structures used for commercial, industrial, or residential purposes shall be assessed as Real Property as an improvement to the land where located.

The Legislature shall provide tax relief to elderly low-income taxpayers through payments by the State to reimburse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities or Towns; provided, that such tax relief for the years 1973 through 1977 shall be not less than an amount equal to the State, County, and Municipal Taxes on Five Thousand ($5,000) Dollars worth of the full market value (or One Thousand Two Hundred Fifty ($1,250) Dollars of the assessed value) of property used for a residence by any taxpayer over sixty-five (65) years of age for a period of one (1) year prior to the date of assessment; provided further, that such relief shall not extend to persons having a

total annual income from all sources in excess of Four Thousand Eight Hundred ($4,800) Dollars.

The Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly.

Tangible Personal Property shall be classified into three (3) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed to thirty (30%) percent of its value; and

(c) All other Tangible Personal Property, to be assessed at five (5%) percent of its value; provided, however, that the Legislature shall exempt Seven Thousand Five Hundred ($7,500) Dollars worth of such Tangible Personal Property which shall cover personal household goods and furnishings, wearing apparel and other such tangible property in the hands of a taxpayer.

The Legislature shall have power to classify Intangible Personal Property into subclassifications and to establish a ratio of assessment to value in each class or subclass, and shall provide fair and equitable methods of apportionment of the value of same to this State for purposes of taxation. Banks, Insurance Companies, Loan and Investment Companies, Savings and Loan Associations, and all similar financial institutions, shall be assessed and taxed in such manner as the Legislature shall direct; provided that for the year 1973, or until such time as the Legislature may provide otherwise, the ration of assessment to value of property presently taxed shall remain the same as provided by law for the year 1972; provided further that the taxes imposed upon such financial institutions, and paid by them, shall be in lieu of all taxes on the redemeeable or cash value of all of their outstanding shares of capital stock, policies of in-

surance, customer savings and checking accounts, certificates of deposit, and certificates of investment, by whatever name called, including other intangible corporate property of such financial institutions.

The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange. The portion of a Merchant's Capital used in the purpose of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

This amendment shall take effect on the first day of January, 1973. [As Amended; Adopted in Convention September 14, 1971; Approved at election August 3, 1972.]

## APPENDIX D

49 U.S.C. § 11503

**§ 11503. Tax discrimination against rail transportation property**

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court throught the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assess-

ment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Pub.L. 95—473, Oct. 17, 1978, 92 Stat. 1445.

**67-601. Definitions.**—For purposes of classification of property:

(1) "Real property" is hereby defined to include lands, tenements, hereditaments, structures, improvements; moveable property assessable under § 67-612; or machinery and equipment affixed to realty (except as otherwise provided for herein) and all rights thereto and interests therein, equitable as well as legal.

(2) "Personal property" is hereby defined to include every species and character of property which is not classified as real property.

(3) "Tangible personal property" is hereby defined to include personal property such as goods, chattels, and other articles of value which are capable of manual or physical posssession, and certain machinery and equipment, separate and apart from any real property, and whose value is intrinsic to the article itself.

(4) "Commercial and industrial tangible personal property" is hereby defined to include personal property such as goods, chattels and other articles of value which are capable of manual or physical possession, and machinery and equipment which is (1) used essentially and principally for the commercial or industrial purposes or processes for which it is intended and (2) if affixed or attached to real property, can be detached without material injury to such real property.

(5) "All other tangible personal proeprty" is hereby defined to include all tangible personal property, including that used in agriculture, except public utility tangible personal property and commercial industrial tangible personal property.

(6) "Intangible personal property" is hereby defined to include personal proeprty such as money, any evidence of debt owed to a taxpayer, any evidence of ownership in a corporation or other business organization having multiple owners, and all other forms of property whose value is expressed in terms of what the property represents rather than its own intrinsic worth. intangible personal property shall include all personal property not defined as tangible personal property.

(7) "Public utility property" is hereby defined to include all property of every kind, whether owned or leased, and used, or held for use, directly or indirectly in the operation of a public utility, which shall include but not necessarily be limited to the following business entities, whether corporate or otherwise: (1) railroad companies; (2) telephone, radio common carriers and telegraph companies; (3) passenger, sleeping, freight and private car companies which is hereby defined as any business, other than a railroad company, which owns, uses, furnishes, leases, rents or operates to, from, through, in or across this state or any part thereof any kind of railroad car, including but not necessarily limited to, flat, tank, refrigerator, passenger, or similar type cars; (4) street car companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies; (11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) taxicab, transit and limousine companies; (13) commercial air carrier companies holding a cer-

tificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration, or any other federal or state regulatory agency; excepting those companies whose operations are solely chartered operations; and (14) water transportation carrier companies which operate boats and barges over the waterways of this state for hire and which hold a certificate of convenience and necessity as common carriers from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency.

(8) "Industrial and commercial property" is hereby defined to include all property of every kind used, directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, club (whether public or private), nonexempt lodge, business, or similar purpose, whether conducted for profit or not. All real property which is used, or held for use, for dwelling purposes which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(9) "Residential property" is hereby defined to include all real property which is used, or held for use, for dwelling purposes and which contains not more than one rental unit. All real property which is used, or held for use, for dwelling purposes but which contains two (2) or more rental units is hereby defined and shall be classified as "industrial and commercial property."

(10) "Farm property" is hereby defined to include all real property which is used, or held for use, in agriculture, including, but not limited to, growing crops, pastures, orchards, nurseries, plants, tree, timber, raising livestock or poultry, or the production of raw dairy products, and acreage used for recreational purposes by clubs.

(11) "Moveable structure" is hereby defined to include any mobile home or such other moveable structure which is constructed as a trailer or semitrailer and designed to either be towed

along the highways or to be parked off the highways, and which may be used, temporarily or permanently, as a residence, apartment, office, storehouse, warehouse or for any other commercial or industrial purpose; but shall not include self-propelled vehicles, sleeping and camping facilities attached to, or designed to be attached to, or drawn by a pick-up truck or an automobile, and which contains less than three hundred (300) square feet of inclosed space. [Acts 1973, ch. 226, § 6; 1974 (Adj. S.), ch. 467, §§ 2, 3.]

T.C.A. § 67-603

*Assessment date.* — All assessments of real property and of personal property shall be made annually and as of January 1 for the year to which the assessment applies unless otherwise provided for, except that for the year 1973 all assessments shall be made as of January 10th. [Acts 1973, ch. 226, § 6]

**67-901. Assessment by public service commission — Companies included.** — The Tennessee public service commission, hereinafter called the commission, is authorized and directed to assess for taxation, for state, county, and municipal purposes, all of the properties of every description, tangible and intangible, within the state, owned by and all personal property used and/or leased by the following named person hereinafter referred to as companies, namely: (1) railroad companies; (2) telephone, radio common carrier, and telegraph companies; (3) passenger, sleeping, freight, and private car companies which is hereby defined as any company, other than a railroad company, which owns, uses, furnishes, leases, rents, or operates to, from, through, in or across this state or any part thereof, any kind of railroad car including but not necessarily limited to flat, tank, refrigerator, passenger, or similar type car; (4) streetcar companies; (5) power companies, whether hydroelectric, steam, atomic, or other kinds for the transmission of power; (6) express companies; (7) pipeline companies; (8) gas companies; (9) electric light companies; (10) water and/or sewerage companies;

(11) motor bus and/or truck companies holding a certificate of convenience and necessity or contract hauler's permit from the Tennessee public service commission or the interstate commerce commission and domiciled in this state and/or owning or leasing real or personal property located in this state; (12) commercial air carrier companies holding a certificate of convenience and necessity from the Tennessee public service commission, civil aeronautics board, federal aviation administration or any other federal or state regulatory agency excepting those companies whose operations are solely chartered operations; and (13) water transportation carrier companies which operate boats and barges over the waterways of this state for hire, and which hold a certificate of convenience and necessity from the Tennessee public service commission, interstate commerce commission or any other federal or state regulatory agency. The commission shall assess all of said property annually as of the same date as other properties are assessed by law; provided, this chapter shall not apply to corporations organized under the laws of Tennessee whose principal business is the manufacture or products of the soil of Tennessee and who for the transportation alone of such products furnish their own cars. [Acts 1973, ch. 226, § 11; 1974 (Adj. S.), ch. 467, § 4.]

**67-902. Basis of value and level of assessment.**—The commission shall assess all operating property, real and personal, tangible and intangible, at fifty-five per cent (55%) of its value. The value shall be determined by the unit rule of appraisal where applicable. The "unit rule of appraisal" is defined as the appraisal of the property as a whole without geographical or functional division of the whole. The "unit" shall be defined as all operating property, tangible and intangible, owned and used and/or leased by the company as determined by the commission.

The commission shall assess all nonoperating property at its proper level according to the use and class of property into

which it may fall. Nonoperating property shall be appraised annually and valued as other locally assessed property. "Nonoperating property" shall be defined as that property not used in the operations of the company as determined by the commission. [Acts 1973, ch. 226, § 11.]

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No. 80-2141

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF TENNESSEE, *et al.*,
*Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *et al.*,
*Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## SUPPLEMENTAL APPENDIX

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## SUPPLEMENTAL APPENDIX

### IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

NO. 79-3025

The State of Tennessee, et al.,
Plaintiffs,

v.

Louisville & Nashville Railroad Company, et al.,
Defendants.

**ORDER**

In accordance with the memorandum contemporaneously filed herein, it is hereby ORDERED that the motions for summary judgment submitted by the defendant Railroads and the defendant United States are granted.

It is ORDERED that 49 U.S.C. § 11503 is constitutional and under the Supremacy Clause of the United States Constitution overrides Tennessee law to the extent that Tennessee's law is inconsistent with 49 U.S.C. § 11503.

It is further ORDERED that 49 U.S.C. § 11503 is hereby declared and held to apply to the 1979 Tennessee tax year and that the 1979 tax assessment of rail transportation property by the State of Tennessee at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property is enjoined.

/s/ Thomas A. Wiseman, Jr.
United States District Judge

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## MEMORANDUM

Plaintiffs, the State of Tennessee, the Public Service Commission of Tennessee and three individual members thereof, the State Board of Equalization of Tennessee and seven individual members thereof, and the Metropolitan Government of Nashville and Davidson County, Tennessee (hereinafter referred to collectively as the "State"), filed their complaint in this Court seeking a declaratory judgment, pursuant to 28 U.S.C. § 2201 and 2202, that section 306 of the Rail Revitalization Regulatory Reform Act of 1976 (4R Act), 49 U.S.C. § 11503,[1]

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[1] The Rail Revitalization Regulatory Reform Act of 1976 has been codified at 45 U.S.C. §§ 801-854. Section 306, designed to implement the congressional purposes of this Act, was codified at 49 U.S.C. § 26c (1976). In 1978 § 26 was repealed and revised without substantive changes becoming 49 U.S.C. § 11503.

(hereinafter referred to as "section 306") is compatible with Tennessee's property tax classification system as set out in T.C.A. § 67-601.[3] In the alternative, the State seeks a declaratory judgment that section 306 is unconstitutional on the grounds that Congress exceeded its power under the Commerce Clause, art. 1, § 8, cl. 3, as limited by the Tenth Amendment to the United States Constitution or because Congress lacked a rational basis for enacting section 306 and failed to select a reasonable and appropriate means of implementing the goals of the 4R Act.

The defendants, Louisville & Nashville Railroad Company and sixteen other railroad companies (hereinafter referred to

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[3] The particular classifications in issue are the public utility property classification and the industrial and commercial property classification. T.C.A. § 67-601(7) defines public utility property to include, *inter alia,* railroad companies, telephone and telegraph companies, power companies, gas companies, and taxicab, transit and limousine companies.

T.C.A. § 67-601(8) defines industrial and commercial property to include, *inter alia,* all property used for business and all real property used for dwelling purposes containing two or more rental units.

collectively as "Railroads")[3] and the United States counterclaim seeking a declaratory judgment that Tennessee's property tax classification system violates the provisions of section 306, that section 306 is a valid and constitutional act of Congress, and that section 306 is in full force and effect from and after February 5, 1979, and is, therefore, applicable to Tennessee's assessment of transportation property for the 1979 Tennessee tax year.

Both the defendant Railroads and the defendant United States have filed motions for summary judgment. Oral arguments were heard on these motions on June 25, 1979.

**Tennessee's Contention That Section 306 Is Compatible With The State's Property Tax Classification System And Does Not Abrogate T.C.A. § 67-601.**

The State maintains that basic principles of statutory construction mandate that section 306 of the 4R Act does not abrogate Tennessee's property tax classification system. In support of this contention the State relies upon a comparison of the definition of commercial and industrial property as defined in

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[3] These companies include: Louisville & Nashville Railroad Company; Clinchfield Railroad Company; Southern Railway Company; Alabama Great Southern Railroad Company; Central of Georgia Railway Company; Cincinnati, New Orleans and Texas Pacific Railway Company; Tennessee, Alabama and Georgia Railway Company; Tennessee Railway Company; Illinois Central Gulf Railroad Company; Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company; East Tennessee and Western North Carolina Railroad Company; Corinth and Counce Railroad Company; St. Louis Southwestern Railway Company; Chattanooga Station Company; Arkansas and Memphis Railway Bridge and Terminal Company; and Chicago, Rock Island and Pacific Railroad Company.

section 306 as opposed to T.C.A. § 67-601(8).[4] This comparison reveals that section 306's definition of commercial and industrial property encompasses commercial transportation property which is included under Tennessee's public utility property classification.[5] On the basis of section 306's more inclusive definition of commercial and industrial property and that section's definition of assessment meaning "valuation for purposes of a property tax levied by any taxing district," the State contends that subsection (1)(a) of section 306 merely prohibits states from discriminating against railroad property in terms of valuation for property tax purposes as opposed to *all other* property devoted to commercial or industrial use. Thus, because Tennessee's public utility property classification includes railroad property in addition to other property defined as commercial and industrial property under section 306, all of which are taxed at a higher tax ratio, Tennessee is not singling out railroad property for discriminatory tax treatment.

This construction of section 306, the State argues, is also consistent with the congressional intent underlying the federal statute as evidenced by the 1961 Report of the Senate Committee on Interstate and Foreign Commerce on National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess. (hereinafter referred to as the "Doyle Report"), a study which focused on the problems of transportation on a national scale with particular emphasis on railroad transportation. The Doyle Report proposed an antidiscrimination tax bill which would protect all common carriers engaged in interstate commerce by insuring that "such carriers would receive equal treatment with

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[4] Section 306 defines commercial and industrial property as "property other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy." 49 U.S.C. § 11503(a)(4).

[5] *See* note 2 *supra*.

other taxpayers subject to the same tax rates *in accordance with applicable State law*" (emphasis in original). Doyle Report at 466. This Court believes, however, that whatever support Tennessee's arguments afford in determining the effect of section 306 upon Tennessee's tax classification system is invalidated by the congressional statements made during the debates preceding the passage of section 306 in which both Senator Howard Baker and Representative Robin Beard of Tennessee attempted to amend the 4R Act in order to exempt from the Act's coverage states having a reasonable classification of property for state purposes. When the 4R Act came before the Senate for a final vote, Senator Baker stated in opposition to section 306, "By failing to include by amendment, therefore, the bill's section on state taxation of transportation property will require the State of Tennessee to reduce the level of assessments of railroads and other interstate carriers from 55 percent to 40 percent." 121 Cong. Rec. S-23043 (daily ed. Dec. 19, 1975). The subsequent enactment of the bill without the requested amendment leaves no doubt but that the federal law would serve to abrogate Tennessee's classification scheme.

**Tennessee's Contention That Section 306 Of The Rail Revitulization Regulatory Reform Act Represents An Impermissible Exercise By Congress Of Its Power Under The Commerce Clause.**

The State asserts in the alternative that, should this Court construe the enactment of section 306 as an abrogation of Tennessee's property tax classification system thereby requiring the State to reduce the level of assessment and taxation of railroad property to that of its commercial and industrial classification, such abrogation must be deemed an impermissible exercise by Congress under the Commerce Clause. In maintaining this argument, however, the State has taken cognizance of the plenary power of Congress to control state laws for the regulation of interstate commerce as established in the leading case of *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). The State

also recognizes that the broad power of Congress to regulate commerce extends to private activities to the exclusion and preemption of state law regulating the same conduct. *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964); *Wickard* v. *Filburn,* 317 U.S. 111, 87 L.Ed. 122, 63 S.Ct. 82 (1942). The plaintiff in *Heart of Atlanta Motel,* a motel owner, refused to rent rooms to Negroes in violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. The plaintiff challenged the constitutionality of the Civil Rights Act arguing that Congress had exceeded its authority to regulate commerce under the Commerce Clause. The Supreme Court, however, refuted this contention stating that,

> [T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.

379 U.S. at 258; 13 L.Ed.2d at 269.

Prior to the *Heart of Atlanta Motel* decision, the plenary power of Congress to regulate commerce had been more dramatically established in *Wickard* v. *Filburn, supra,* in which a federal prohibition against the unlicensed growing of wheat was held valid as applied to a small Ohio farmer who produced 239 bushels for on-farm consumption without federal authorization. The Court's holding in *Wickard* was based on the conclusion that even local activity may be regulated by Congress should such activity exert a substantial economic effect on interstate commerce whether direct or indirect. 317 U.S. at 125, 87 L.Ed. at 135.

While recognizing that the power of Congress to regulate interstate commerce is plenary under the Commerce Clause, the State is also aware that the Commerce Clause itself imposes certain restrictions on the state in the area of taxation. These restrictions are enunciated in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959), wherein the Supreme Court held that a state cannot impose taxes on itinerants and a state cannot tax the privilege of engaging in interstate commerce either by providing a direct commercial advantage to local business or by subjecting interstate commerce to the burden of "multiple taxation." The Court explained that such impositions by the states under the Commerce Clause are not allowed because they interfere directly with the free flow of commerce.

Additionally, the Railroads have cited four cases in support of the proposition that the power of Congress under the Commerce Clause includes the power to control state taxation affecting interstate commerce. These cases were relied upon in the recent decision of *Arizona* v. *Atchison, Topeka & Santa Fe R.R. Co.,* No. 78-655 (D. Ariz. Jan. 26, 1979), in which the Arizona district court addressed the issue of whether section 306 was constitutional in light of the Tenth Amendment's reservation of certain powers to the states and the broad powers given Congress under the Commerce Clause. Determining that section 306 was constitutional, the Arizona court cited *Moorman Mfg. Co.* v. *Bair,* 437 U.S. 267, 57 L.Ed.2d 197, 98 S.Ct. 2340 (1978). In *Moorman,* the plaintiff, an Illinois corporation which sold its products in Iowa, challenged the constitutionality of Iowa's single-factor sales formula as opposed to the three-factor formula employed by most states for apportioning an interstate corporation's income for state income tax purposes. The Illinois corporation claimed that the single-factor formula resulted in duplicative taxation of income and that, to the extent that the overlap in taxation was permitted, a corporation engaging in interstate business shouldered a tax burden not shared by solely intrastate businesses. The Court, however, declined to in-

validate the Iowa statute establishing the single-factor formula, reasoning that the imposition of national uniform rules for the division of income would not reflect the national interest "because the interests of those States whose policies are subordinated in the quest for uniformity would be excluded from the calculation." *Id.* at 280, 57 L.Ed.2d at 209. On the other hand, the Court did indicate that Congress was empowered to establish uniform rules of apportionment by stating that the "legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all states to adhere to uniform rules for the division of income. It is to that body and not this court, that the Constitution has committed such policy decisions." *Id.*

The second case which the Railroads cite holding that Congress under the Commerce Clause can control state taxation is *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 8 L.Ed.2d 620, 82 S.Ct. 1380 (1962). The plaintiff in this decision challenged the constitutionality of a Texas statute which imposed a tax on insurance premiums paid out-of-state on out-of-state contracts covering risks within the state. The Court held that the Texas statute was invalid and subordinate to the McCarran-Ferguson Act, 15 U.S.C. § 1011, which precluded a state from taxing contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the state. In so ruling, the Court referred to the principle that "[t]he power of Congress to grant protection to interstate commerce against state regulation or taxation . . . or to withhold it . . . is so complete that its ideas of policy should prevail." *Id.* at 456, 8 L.Ed.2d at 624 (citations omitted). However, in a footnote to this statement, the Court qualified the above principle by citing *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 90 L.Ed. 1342, 66 S.Ct. 1142 (1946), wherein the Court, in reference to the plenary scope of power given to Congress under the Commerce Clause, stated that:

> That power [power of Congress over commerce] does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely or close it entirely, subject only to restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.

*Id.* at 434, 90 L.Ed. at 1362.

Thirdly, the Railroads cite *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 89 L.Ed. 1252, 65 S.Ct. 870 (1945), in which the petitioner, an importer of hemp and other fibers from the Philippine Islands, protested Ohio's taxation of the fibers which had been stored in plaintiff's warehouse prior to their manufacture. The Court held that the goods were immune from state taxation under the import clause, art. 1, § 10, cl. 2 of the United States Constitution, based upon the policy of protecting national commercial relations. When confronted with the state's argument that the goods did not qualify as imports in that they were not brought into the United States from a foreign country, the Court responded, "Congress through the commerce clause, possess the same power of control of state taxation of all merchandise moving in interstate or foreign commerce." *Id.* at 679, 89 L.Ed. at 1271.

Fourthly, the Railroads refer to *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 88 L.Ed. 1283, 64 S.Ct. 950 (1944), in which the Court grappled with the problem of whether Minnesota, as the domiciliary state of plaintiff corporation, was constitutionally limited in levying a personal property tax on the fleet of airplanes owned and operated by the corporation in interstate transportation. The Court concluded that Minnesota, as the home state, was empowered to tax all movables that came within it except for property that had been permanently situated within another state during the entire tax year. The Court asserted that Congress could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary

state from the authority which it otherwise would have because it is the domiciliary state. In addition, Justice Jackson, in his concurring opinion, recognized the extent of federal control over air transit in the area of its privileges, rights, and protection. In this context, he stated that constitutionally Congress could exact a single uniform tax on the property or the business to the exclusion of state taxation.

Although in the present case the State concedes that the Commerce Clause gives Congress broad powers to regulate interstate commerce and prohibits state taxation which discriminates against interstate commerce, the State argues that Tennessee is permitted to tax property used in interstate commerce where the property is permanently located or commonly used in the taxing state. *Pullman Co.* v. *Richardson,* 261 U.S. 330, 67 L.Ed. 682, 43 S.Ct. 366 (1923). Upon this premise the State maintains that Tennessee's taxation of railroad property within its boundaries is a legitimate exercise of its sovereign power. Moreover, the State asserts that its means of taxing railroad property within its boundaries is just and reasonable under the Commerce Clause and the Fourteenth Amendment. In support of this assertion, the State argues that Tennessee's tax classification system is applied to an activity with a substantial nexus with Tennessee and its political subdivisions, is fairly apportioned, does not discriminate against or unduly burden interstate commerce, is not confiscatory and complies with the due process and equal protection requirements of the Fourteenth Amendment. Furthermore, the State cites *Louisville & Nashville R.R. Co.* v. *Atkins,* 390 F.Supp. 576 (M.D. Tenn. 1975), in which this Court upheld Tennessee's classification of railroads as public utility property despite claims that such classification by the Tennessee legislature was arbitrary and unreasonable and, therefore, in violation of the Fourteenth Amendment to the Constitution. It is noteworthy that the plaintiff in *Atkins* asserted that the financial change of conditions in the railroad industry rendered invalid the factual basis of the Supreme Court's statement in *Nashville, Chattanooga & St. L. Ry Co.* v. *Browning,* 310 U.S. 362, 368, 84 L.Ed. 1254, 1257, 60 S.Ct. 968 (1940):

> That the states may classify property for taxation; may set up different modes of assessment, valuation, and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the commonplaces of taxation and of constitutional law.

In light of the change of circumstances which adversely affected the railroads in *Atkins,* this Court, nevertheless, held that the plaintiff must show that the changed circumstances had rendered Tennessee's classification of railroads as public utilities invidiously discriminatory which the plaintiff had not done. In reaching this conclusion, the Court cited *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 526-27, 3 L.Ed.2d 480, 484, 79 S.Ct. 437 (1959), wherein the Supreme Court stated that:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests . . . . The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products . . . . To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.

Thus, having submitted that Tennessee's property tax classification system is both permissible as a valid exercise of state sovereignty under the Commerce Clause and is constitutional according to *Browning, supra,* and *Atkins, supra,* the State argues that section 306 does not preempt its tax classification scheme.

The State also contends that the broad powers given Congress under the Commerce Clause to regulate interstate commerce are limited by the Tenth Amendment. *National League of Cities* v. *Usery*, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976). In *National League of Cities* the Supreme Court held that the 1974 amendments to the Fair Labor Standards Act extending the Act's minimum wage and hour provisions to the states were not within the authority granted to Congress by the Commerce Clause. In making this determination the Court looked to the relationship of that activity to the purpose of state government instead of considering whether an activit undertaken by a state falls within the realm of commerce. Speaking through Justice Rehnquist, the Court acknowledged that employment activities of a state fall within the broad definition of commerce but concluded that the Tenth Amendment's protection of state sovereignty embodied an affirmative limitation which could render the commerce power invalid when such power was applied to the states as states. Support for this holding was found in the intergovernmental tax immunity cases as well as a declaration taken from a footnote in *Fry* v. *United States*, 421 U.S. 542, 547, 44 L.Ed.2d 363, 369, 95 S.Ct. 1792 (1975), that the Tenth Amendment prohibits Congress from exercising its power in a manner "that impairs the States' integrity or their ability to function effectively in a federal system." In order to determine when a state activity is protected from federal regulation emanating from the commerce power, the Court focused on the nature of the state activity and whether it was traditionally an essential function of state government. Under this one-dimensional state interest test, the regulation of wages and hours for public employees was deemed a primary function of the states as sovereign governments not to be displaced by federal legislation. Tennessee contends that in the present case, the State has exercised its sovereign power in providing for the taxation of railroad company properties as a public utility within the state. In view of the holding in *National League of Cities*, the State maintains that Congress by enacting section 306

exceeded the limitations of the Tenth Amendment which according to at least four Justices stands as a restraint on congressional power under the Commerce Clause.

Justice Blackmun's brief concurring opinion in *National League of Cities,* however, interpreted the analysis of the majority as a balancing approach and in his estimate the states' interest in sovereignty rightly tipped the scale. Use of this analysis enabled him to suggest that in the area of environmental protection, for example, federal regulation ought to be tolerated because the national interest is greater than that of the states. Since Justice Blackmun's concurrence was the swing vote in the ultimate holding of *National League of Cities,* it is impossible to discern what test, if any, was established for analyzing congressional exercises of power pursuant to the Commerce Clause Therefore, this Court looks to the judicial tests employed prior to *National League of Cities* and as seen in the recent cases of *Arizona Pub. Serv. Co.* v. *Snead,* 47 U.S.L.W. 4397 (U.S. Ap. 18, 1979) (No. 77-1810) and *Arizona* v. *Atchison, Topeka & Santa Fe R.R. Co.,* No. 78-655 (D. Ariz. Jan. 26, 1979).

When confronted with the plaintiff's contention that the holding in *National League of Cities* renders section 306 unconstitutional on the ground that Congress impermissibly exceeded its authority under the Commerce Clause to enact such legislation, the Court in *Santa Fe* employed a balancing of federal and state interest test similar to that used by the Supreme Court in *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 89 L.Ed. 1915, 65 S.Ct. 1515 (1945), and implicitly in *National League of Cities, See* 462 U.S. at 856, 49 L.Ed.2d at 260 (Blackmun, J. concurring). In *Southern Pacific* the United States Supreme Court stated that, "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." *Id.* at 769, 761

L.Ed. at 1925. The Supreme Court, however, did not disregard the burden which a state regulation imposes on interstate commerce but rather examined the nature and extent of such burden in addition to comparing the relative weights of the state and national interests involved. In *Santa Fe* the Court weighed the state's interest in a discriminatory tax classification system against the federal interest in eliminating or reducing discriminatory taxation of railroad property in an effort to revitalize the railway industry. On balance, the Court concluded that the federal interest was superior and that section 306, as the defendants in the present case contend, did not directly dictate to the state how essential decisions concerning integral government functions should be made. This conclusion was premised on the reasoning that under section 306, the states are free to collect the same amount of revenue by means other than a property tax scheme which discriminates against railroad companies and that a restriction on a state's means of tax collection did not directly or significantly affect state policy choices. This Court also concludes that Congress' effort to revitalize the railroad industry by implementing the 4R Act overrides the State's interest in maintaining a property tax classification system and, therefore, section 306 passes the balancing test used in *Santa Fe*.

In *Arizona Pub. Serv. Co.* v. *Snead, supra,* the state tax which was in issue was imposed by New Mexico on all companies generating electricity within the state. The effect of the tax was to discriminate against out-of-state consumers in violation of the Tax Reform Act of 1976, 12 U.S.C. § 391. The Supreme Court, in response to New Mexico's contention that the Tax Reform Act exceeded the permissible bounds of congressional action under the Commerce Clause, stated that:

> In view of the broad power of Congress to regulate interstate commerce this argument must be rejected. Here, the Congress had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that in-

terference. The legislation thus was within the constitutional power of Congress to enact.

*Id.* at 4400.

The question of whether section 306 also passes the above rational basis test espoused in *Snead* is discussed in relation to the third contention raised by the State.

**The State's Contention That Section 306 Is Arbitrary, Inappropriate, And Without A Rational Basis.**

Apart from the alleged Tenth Amendment limitations on the exercise of congressional power under the Commerce Clause, the State maintains that section 306 fails the traditional two-part test of determining the constitutionality of federal legislation under the Commerce Clause as expressed in *Hewlett-Packard Co.* v. *Barnes,* 425 F.Supp. 1294 (N.D. Cal. 1977), citing *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 258-259, 13 L.Ed.2d 258, 85 S.Ct. 348 (1964), and in *Snead, supra.* Under this test Congress must have a rational basis to find that an activity affects interstate commerce and if Congress has such a basis, it must select a reasonable and appropriate means of eliminating the detrimental effect that such activity has on interstate commerce. This test stems from the guiding principle for congressional action set forth by Chief Justice John Marshall in *McCullough* v. *Maryland,* 17 U.S. (4 Wheat.) 415, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional."

The first facet of this rational basis test, whether a certain end is within the scope of the commerce power or affects commerce as amplified by the Necessary and Proper Clause, art. 1, § 8, cl.

1 of the United States Constitution,[6] has been tested by two means constructed by the Supreme Court. The now obsolete direct and indirect distinction provided that only activities with "direct" effects on interstate commerce were within the commerce power. This test was replaced by the broader test of "substantial economic effect" on interstate commerce under which a rational basis has been found where the complete range of the wheat industry was being regulated;[7] where discrimination by restaurants could have a substantial effect on commerce;[8] and where extortionate credit transactions, viewed as a class, were seen to affect interstate commerce, including interstate crime.[9] In light of this broad substantial economic effect test, this Court finds that Tennessee's property tax classification system under which railroads are classified as a public utility "affects" interstate commerce.

The second facet to be examined under the rational basis test is whether the legislative means selected are appropriate. The State maintains that section 306 does not represent a reasonable and appropriate means of regulation to accomplish the removal of discrimination in property taxation because the statute singles out railroad property for discriminatory tax treatment favorable to railroads to the exclusion of other public utilities. Thus, it is asserted that section 306 is in essence a legislatively

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[6] The Necessary and Proper Clause states that, "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

[7] *Wickard* v. *Filburn, supra.*

[8] *Katzenbach* v. *McClung,* 379 U.S. 294, 13 L.Ed.2d 290, 85 S.Ct. 377 (1964).

[9] *Perez* v. *United States,* 402 U.S. 146, 28 L.Ed.2d 686, 91 S.Ct. 1357 (1971).

mandated state subsidy for railroads. As support for this proposition, the State cites *Metcalf* v. *Mitchell,* 269 U.S. 514, 70 L.Ed. 384, 46 S.Ct. 172 (1926) and *New York* v. *United States,* 326 U.S. 572, 90 L.Ed. 326, 66 S.Ct. 310 (1946) (Rutledge, J., concurring). In *Metcalf,* the Court held that the plaintiff consulting engineers employed by the state to assist in state projects were not exempted from federal income taxation. The State quotes a passage from this case asserting that the limitation on the taxing power of the state and federal government "cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it . . . ." *Id.* at 523, 70 L.Ed. at 392 (citations omitted). From this authority, the State alleges that section 306 seriously interferes with the sovereign taxing powers of the states in order to achieve the end of alleviating the railroad companies' financial woes. In response to this contention, however, this Court believes that it can be asserted with equal force that Tennessee's taxation of railroads at a higher rate than properties within its commercial and industrial classification seriously impairs the flow of interstate commerce, an appropriate concern of the federal government. Indeed, the Supreme Court in *New York* v. *United States, supra,* stated that the restriction upon states not to make laws that discriminate against interstate commerce is a vital constitutional principle. From this premise this Court refers to the cases cited by the defendants and the Court in *Santa Fe, supra,* indicating that the power of Congress under the Commerce Clause includes the power to control state taxation affecting interstate commerce. *Moorman Mfg. Co.* v. *Blair, supra; State Board of Ins.* v. *Todd Shipyards Corp., supra; Hooven & Allison Co.* v. *Evatt, supra;* and *Northwest Airlines, Inc.* v. *Minnesota, supra.* Furthermore, under the rational basis test the Supreme Court has stated that it would "certainly not substitute its judgment for that of Congress in such a matter [selecting a means of eliminating an activity having a detrimental effect on interstate commerce] unless the relation of the sub-

ject to interstate commerce and its effect upon it are clearly nonexistent." *Stafford* v. *Wallace,* 258 U.S. 495, 521, 66 L.Ed. 735, 743, 42 S.Ct. 397 (1922).

Thus in analyzing section 306 under the rational basis test, this Court finds that Congress did have a rational basis for determining that state property tax classification systems which assess railroad property at a higher rate than properties classified as commercial and industrial property "affects" interstate commerce. This Court also finds that Congress has selected a reasonable means by the enactment of section 306 of eliminating the adverse effects that such a state taxation scheme has on interstate commerce and will not substitute its judgment of what is a reasonable means for that of Congress.

**Tennessee's Contention That Section 306 Of The 4R Act, Even If Valid, Does Not Affect Property Tax Assessments In Tennessee For The 1979 Tax Year.**

The State relies on T.C.A. § 67-603 to bolster its contention that section 306, if deemed to be valid, does not take effect in Tennessee until the 1980 tax year. T.C.A. § 67-603 mandates that all assessments of real and personal property are to be made annually as of January 1 for the year to which the assessment applies. The State argues, therefore, that although the process of making assessments occurs later in the year, section 306 has no impact on the current tax year since it did not become effective until February 5, 1979.

The defendants counter this argument from two standpoints. First, the defendants assert that T.C.A. § 67-603 was not intended to foreclose any legislative change in tax practices after January 1, citing *McCord* v. *Nashville, Chattanooga & St. Louis Ry.,* 187 Tenn. 277, 213 S.W.2d 196 (1948). In *McCord* the tax law was amended to require the biennial assessment of railroad property in the odd rather than the even years as previously established. In determining that the legislative change should be

given immediate effect, the Tennessee Supreme Court looked to the legislative intent in enacting the amendment stating that:

> Historical consideration of the practice established under former changes in the law is persuasive and justifies a conclusion that if by the amendments of 1945, the Legislature had wished to depart from the practice established under former amendments, it would have expressed an intention to do so. Since the creation of the Commission in 1897, there have been four changes in the year for making the biennial assessment of railroads, and in each of the four cases the change has been given effect immediately, and the assessment made and tax collected under the changed law in the year of its enactment by the Legislature.

187 Tenn. at 289-90, 213 S.W.2d at 202.

The defendants contend that under Tennessee law, legislative modifications in assessment practices enacted or effective after the taxable date must be given application during that tax year unless the Legislature otherwise directs.

This Court concludes, however, as did the court in *Great So. R.R. Co.* v. *Eagerton,* No. 79-173-N (D. Ala. Jun. 20, 1979), when confronted with the question of whether section 306 required a reduction in Alabama's assessment ratio for the 1979 tax year, that the intent of the Tennessee legislature is not helpful in construing a federal statute. This Court is persuaded, on the other hand, by defendants' second contention that the doctrine of federal supremacy requires that section 306 be given effect during the 1979 tax year. Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, a state statute can be preempted by a federal law. Among the state statutes subject to displacement are those which conflict with a valid federal statute, *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963), and those which stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Ray* v. *Atlantic*

*Richfield Co.*, 435 U.S. 151, 55 L.Ed.2d 179, 98 S.Ct. 988 (1978). This Court has previously determined Tennessee's property tax classification system is in conflict with the mandates of section 306. Furthermore, an examination of the legislative history of section 306 reveals that the congressional purpose of delaying the effective date of that statute for a period of three years from the date of its enactment was to lighten any impact upon the states and local communities by spreading the burden over a term of several years and to afford state legislatures an opportunity to take whatever steps were necessary to come into compliance with that statute's requirements. This three year period expired February 5, 1979. As the defendants have stated, the Tennessee statutes under which the railroad property is assessed prescribe a timetable for yearly valuation and assessment. Under T.C.A. § 67-931, the Public Service Commission must complete its valuation and assessment of railroad property on or before the first Monday in August. Under T.C.A. § 67-933, the State Board of Equalization need not certify to the Public Service Commission the final and conclusive assessment of railroad property until the third Monday in October. It is not until February 28, 1980, that the taxes based on such assessments are required to be paid. To make section 306 applicable for the first time to the 1980 tax year for which taxes are not due until 1981, more than five years after the enactment of section 306, and more than two years after its effective date, is contrary to the three-year phase-in plan of Congress. Such a construction frustrates the congressional purpose in fixing the effective date of section 306. On the basis of the doctrine of federal supremacy, therefore, this Court concludes that the federal statute prohibiting tax discrimination against rail transportation property which became effective February 5, 1979, requires the State of Tennessee to reduce the assessment ratio for railroad property to the assessment ratio of other commercial and industrial property for the 1979 tax year.

**Tennessee's Contention That No Injunctive Relief Can Be Granted Under Section 306 Until Assessments Of Railroad Property Have Been Made.**

The State maintains that under section 306(2)(c) a state must make its tax assessment of railroad property before this Court can review such assessments for compliance with section 306. Only then, the State argues, can the Court determine whether the assessments are invalid and enjoin their levy and collection. It is contended that to grant injunctive relief prior to the making of assessments would confer upon the courts the power to assess and levy a property tax, a power which, according to *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744, 6 L.Ed.2d 66, 81 S.Ct. 870 (1961), a federal district court does not have. In *Moses Lake,* the Court of Appeals for the Ninth Circuit agreed with the district court that the tax assessed by a county in the state of Washington against leasehold estates of lessees from the federal government was invalid because of its discriminatory nature. The Supreme Court determined that it was error for the appellate court to remand the case to the district court directing that court to decree a valid tax for an invalid one by reducing the tax to what it would have been had the tax been levied on a nondiscriminatory basis. Against this factual background, the Supreme Court stated that only the appropriate taxing officials may assess and levy taxes although the federal courts may declare such taxes to be void.

Since Congress has expressly authorized federal courts to grant injuctive relief in furtherance of the express purposes of section 306, it is not required that irreparable harm or inadequacy of legal remedies first be shown. *United States* v. *City and County of San Francisco,* 310 U.S. 16, 30, 84 L.Ed. 1050, 60 S.Ct. 740, 757 (1940).

Therefore, having determined that section 306 is constitutional and is applicable to the 1979 Tennessee tax year, an assessment of railroad property by the State of Tennessee con-

trary to the terms of that statute must be enjoined. Unlike the district court in *Moses Lake,* this Court is not assessing a property tax by decreeing a valid tax for an invalid one. Instead, the Court is exercising its remedial powers granted under section 306 by enjoining the assessment of rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. Such a remedy is necessary to effectuate the congressional policy under the 4R Act.

/s/ Thomas A. Wiseman, Jr.
United States District Judge

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,

No. 80-2141

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE STATE OF TENNESSEE, *et al.*, *Petitioners*,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *et al.*, *Respondents*.

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On Petition for Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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## BRIEF OF RESPONDENTS IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Did The District Court Correctly Hold That Section 306 Is A Valid Exercise Of Congressional Power Under The Commerce Clause?

II. Did The District Court Correctly Hold That Tennessee's Classified Property Tax System Violates The Express Terms Of Section 306 And Conflicts With Its Intended Purpose And Effect?

III. Did The District Court Correctly Hold That Section 306 Applies To The 1979 Tax Year In Tennessee?

## PARTIES

The parties to this case are accurately listed in the petition, except that, as a result of a merger effective November 21, 1980, Burlington Northern Inc. is the successor in interest to the Respondent, St. Louis San Francisco Railway Company. Pursuant to Rule 28.1 of the Revised Rules of The United States Supreme Court, a list of the parent, subsidiary and affiliated companies of each Respondent is set forth in Appendix A to this Brief.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE STATE OF TENNESSEE, *et al., Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *et al., Respondents.*

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**On Petition for Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

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## BRIEF OF RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth Circuit, a copy of which is contained in Appendix A to the Petition, was filed March 20, 1981. The opinion of the United States District Court for the Middle District of Tennessee, Nashville Division, a copy of which is contained in the Supplemental Appendix to the Petition, was filed August 15, 1979, and is reported at 478 F. Supp. 199.

## JURISDICTION

The jurisdictional statement contained in the petition is adequate.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of Constitutional and Statutory Provisions Involved contained in the petition is adequate.

## COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Petitioners' statement of the case, Respondents offer the following counterstatement:

Petitioners seek to overturn the decisions below which uphold the constitutionality of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976[1] and direct the Petitioners to comply with its provisions for the 1979 tax year. Section 306 prohibits states from taxing rail transportation property in a discriminatory manner after February 5, 1979.[2] Specifically, Sec-

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[1] Pub. L. No. 94-210, 90 Stat. 31, (Feb. 5, 1976). Section 306, 90 Stat. 54, was codified at 49 U.S.C. §26c (1976). On October 13, 1978, certain statutes related to transportation were collected, revised, codified and enacted as Title 49 of the United States Code; 49 U.S.C. §26c became §11503. The language of 49 U.S.C. §11503 as codified differs somewhat from the language of Section 306 as enacted. Because 49 U.S.C. §11503 cannot be construed as making any substantive change to the meaning of Section 306, *see* Section 3(a) of Pub. L. No. 95-473, 92 Stat. 1466, the Respondents will refer to the original language of Section 306 in this Brief and will refer to 49 U.S.C. §11503 as "Section 306." A copy of Section 306 is included in Appendix B to this Brief.

[2] By its terms, Section 306 became effective three years from the date of its enactment, February 5, 1976. *See* Pub. L. No. 94-210, §306(2)(b); Pub. L. No. 95-473, §2(a)(5)(b).

tion 306 prohibits states, subdivisions of states, or any authority acting for a state or a subdivision of a state, from assessing rail transportation property at ratios of value higher than those applicable to "commercial and industrial property" in the same state. Section 306 defines "commercial and industrial property," specifies how discrimination against rail transportation property may be proven, and expressly confers jurisdiction upon federal courts to grant mandatory or prohibitive injunctive relief to prevent such discrimination.

Congress enacted Section 306 following a lengthy and thorough investigation into the effects of discriminatory state taxation of railroads upon the nation's economy. As early as 1961, a congressional committee observed that intentional state tax discrimination against railroads and other interstate carriers was pervasive and that such discrimination constituted an undue burden on interstate commerce. A report of this committee, known as the Doyle Report,[3] recommended that Congress enact legislation which would eliminate such discrimination and provide interstate carriers with a federal remedy to prevent it.

Following the recommendations of the Doyle Report, congressional committees studied and considered a series of legislative proposals which prohibited discriminatory state taxation of railroads,[4] held extensive

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[3] Report of the Committee on Commerce, United States Senate, by its Special Study Group on Transportation Policies in the United States, S. Rep. No. 445, 87th Cong., 1st Cong., 1st Sess. (1961).

[4] *See* H.R. 7421, 87th Cong., 1st Sess. (1961); H.R. 7497, 87th Cong., 1st Sess. (1961); H.R. 736, 88th Cong., 1st Sess. (1963); H.R. 4972, 89th Cong., 1st Sess. (1965); S. 2988, 89th Cong., 2d Sess. (1966); H.R. 1480, 90th Cong., 1st Sess. (1967); S. 927, 90th Cong., 2d Sess. (1968); S. 2290, 91st Cong., 1st Sess. (1969); H.R. 16245, 91st Cong., 2d Sess. (1970); S. 2841, 92 Cong., 1st Sess.

hearings on many of these proposals,[5] and issued numerous reports regarding the necessity for such legislation and the manner in which such anti-discriminatory legislation should be structured.[6] In 1976, having determined that revitalization of the nation's railroad industry was essential to the nation's economic well-being, and having determined that elimination of state tax discrimination against railroads would enhance the railroad industry's prospects for survival, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976, which included the anti-discriminatory tax provisions of Section 306.[7] Section 306 is, in short, remedial legislation

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(1971); S. 3945, 92d Cong., 2d Sess. (1972); S. 1891, 93d Cong., 1st Sess. (1973).

[5] *See* Discriminatory Taxation of Common Carriers: Hearings on S. 927 Before the Subcommittee on Surface Transportation of the Senate Commerce Committee, 90th Cong., 1st Sess. (August 7, and 8, 1967); State Tax Discrimination Against Interstate Carrier Property: Hearings on S. 2289 Before the Subcommittee on Surface Transportation of the Senate Commerce Committee, 91st Cong., 1st Sess. (July 30, 1969); Common and Contract Carrier State Property Tax Discrimination: Hearings on H.R. 16245, H.R. 16251, H.R. 16316, H.R. 16357, H.R. 16411, H.R. 16639, and S. 2289 Before the Subcommittee on Transportation and Aeronautics of the House Interstate and Foreign Commerce Committee, 91st Cong., 2d Sess., (June 9, 1970).

[6] *See* Report by the Committee on Interstate and Foreign Commerce Together with Additional and Minority Views, H. Rep. No. 93-1381, 93d Cong., 2d Sess. (1974); Disciminatory State Taxation of Interstate Carriers, Report of the Senate Committee on Commerce, S. Rep. No. 92-1085, 92d Cong., 2d Sess. (1972); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 1483, 90th Cong., 2d Sess. (1968).

[7] *See* S. Rep. No. 94-499, 94th Cong., 2d Sess. (1976), (1976) U.S. Code Cong. & Ad. News, p.p. 14, 180.

enacted by Congress as part of a comprehensive scheme to revitalize the nation's railroads and to protect the nation's economy.

Pertinent Tennessee ad valorem tax statutes[8] require rail transportation property (and other public utility property) to be assessed at fifty-five percent of value, with respect to both real and personal property, and require commercial and industrial property to be assessed at forty percent of value with respect to real property and at thirty percent of value with respect to personal property. Although the tax lien date in Tennessee is January 1 of each year, the act of assessing the Respondents' rail transportation property for the 1979 tax year did not occur until after February 5, 1979.

On January 19, 1979, the Petitioners filed their complaint in the United States District Court for the Middle District of Tennessee, Nashville Division, seeking alternative declarations that (1) Section 306 is, as construed by the Petitioners, compatible with Tennessee law; or (2) Section 306 is unconstitutional because it infringes upon Tennessee's taxing power in violation of the Tenth Amendment of the United States Constitution.

The Respondents filed their answer and counterclaim seeking declarations that (1) Section 306 is a valid and constitutional act of Congress; (2) Tennessee's property tax classification system violates the prohibitions of Section 306; and (3) Section 306 was in full force and effect from and after February 5, 1979, and is applicable to Tennessee's assessments of rail transportation property for the 1979 tax year. The Respondents also sought an injunction prohibiting the Petitioners from assessing the Respondents' property contrary to Section 306 for the

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[8] *See* Appendix C to the petition.

1979 tax year. The United States of America (United States) intervened and filed an answer seeking a declaration that Section 306 is a valid and constitutional act of Congress and seeking an injunction prohibiting the state from taxing rail transportation property contrary to the provisions of Section 306. All parties moved for summary judgment.

On August 15, 1979, the district court issued its memorandum and order granting summary judgment for the Respondents and the United States and declaring Section 306 constitutional and applicable to Tennessee assessments for the 1979 tax year. The district court also enjoined the assessment of rail transportation property by the Petitioners at a value which bears a higher ratio to the true market value of rail transportation property than the ratio which the assessed value of commercial and industrial property in Tennessee bears to the true market value of such commercial and industrial property.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. On March 20, 1981, the Court of Appeals issued an opinion affirming the district court's ruling that Tennessee's classification of railroad property for ad valorem tax purposes was in direct conflict with the provisions of Section 306 and must, therefore, be declared invalid; that Section 306 does not infringe upon Tennessee's taxing powers in violation of the Tenth Amendment; and that Section 306 affects Tennessee's property tax assessments for the 1979 tax year. The Court of Appeals concluded that the district court's decision was correct and in accordance with the decisions of other circuits in *Atchison, Topeka & Santa Fe R.R.* v. *Lennen,* No. 80-2299 (10th Cir., Jan. 23, 1981) and *Alabama Great Southern R.R.* v. *Eagerton,* 472 F.

Supp. 60 (M.D. Ala. 1979), *aff'd* 629 F.2d 1347 (5th Cir. 1980), and with the decision of the district court of Arizona in *Arizona* v. *Atchison, Topeka & Santa Fe R.R.*, No. 78-655 (Jan. 26, 1979).[9] The Arizona decision has been affirmed by the United States Court of Appeals for the Ninth Circuit, *State of Arizona* v. *Atchison, Topeka & Santa Fe*, No. 79-3183 (June 12, 1981), a copy of which is included in Appendix C to this Brief.

## REASONS FOR DENYING THE WRIT

### 1. In This Case, There Are No Special Or Important Reasons For Granting The Writ.

The petition does not comply with Rule 17 of the rules of this Court in that it fails to set forth any special or important reasons for granting the writ. The petition is nothing more than an appellate brief which reargues the merits of the case. In fact, there are no special or important reasons for granting the writ and the petition should be denied.

### 2. The Decisions Of The District Court And Court Of Appeals In This Case Are In Accord With Applicable Decisions Of This Court, And Are Consistent With Decisions Of Other Federal Courts Of Appeal On The Same Matter.

The chief contention of the Petitioners is that the decisions of the district court and court of appeals in this case are contrary to the decision of this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which holds that Congress may not exercise its power under the commerce clause to force directly upon the states Congressional choices as to how "essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. 855.

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[9] *See* Appendix B to the petition.

Petitioners ignore those decisions of this Court which have held expressly that Congress has the power under the commerce clause to regulate state taxation affecting interstate commerce, *see, e.g., Moorman Manufacturing Co.* v. *Bair,* 437 U.S. 267 (1978); *State Board of Insurance* v. *Todd Shipyards Corp.,* 370 U.S. 451 (1962); *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652 (1945); *Northwest Air Lines, Inc.* v. *Minnesota,* 322 U.S. 292 (1944), and, most importantly, Petitioners ignore the decision of this Court in *Arizona Public Service Co.* v. *Snead,* 441 U.S. 141 (1979). *Snead* holds specifically that Congress has the power under the commerce clause to prohibit state taxation which discriminates against interstate commerce.

In *Snead,* the State of New Mexico argued that Section 2121(a) of the Tax Reform Act of 1976, 12 U.S.C. §391, which expressly prohibits states from imposing taxes on the generation or transmission of electricity that discriminate against out-of-state producers, sellers or users, was an impermissible exercise of Congress' power under the commerce clause. This Court rejected that contention, saying:

> "The appellees [New Mexico] also argue that if the federal statute is construed to invalidate the New Mexico tax, it exceeds the permissible bounds of congressional action under the Commerce Clause. In view of the broad power of Congress to regulate interstate commerce, this argument must be rejected. See *Wickard* v. *Filburn,* 317 U.S. 111; *Katzenbach* v. *McClung,* 379 U.S. 294. Here, the Congress had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that inteference. The legislation thus was within the constitutional power of Congress to enact. See *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 258-259; *United*

> *States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119." 441 U.S. 150.

With respect to Congress's power under the commerce clause to prohibit discriminatory state taxation, *Snead* is indistinguishable from the present case. *National League of Cities*, which concerned the applicability of federal wage and hour provisions to state employees and which antedated the *Snead* decision, is as irrelevant to this case as it was to *Snead*. The most recent decisions of this Court dealing with *National League of Cities* support this conclusion. *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, Nos. 79-1538, 79-1596, 49 U.S.L.W. 4654 (June 15, 1981); *Hodel* v. *Indiana*, No. 80-231, 49 U.S.L.W. 4667 (June 15, 1981).

In *Atchison, Topeka & Santa Fe R.R., supra*, the State of Arizona advanced the same arguments made by the Petitioners in this case, i.e., that Section 306 infringes upon state taxing power in violation of the Tenth Amendment, citing *National League of Cities*. In affirming the Arizona district court's decision upholding the constitutionality of Section 306, the Ninth Circuit stated:

> "Congress's power to enact section 306 is unaffected by the Tenth Amendment, as interpreted by *National League of Cities, supra*.
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> * * *
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> [T]hat case does not require us to invalidate section 306. Section 306 requires no change in structure of state government. *See Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d. Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977). It does not require the states to alter or abolish any state programs or services. It does not displace state policy in the determination of the performance of basic governmental services. Indeed, it may not even cost the state money, in terms of decreased tax

revenues. At most, section 306 requires states to alter their tax structures so that railroad property is assessed at a ratio no higher than that of other commercial and industrial property.

Moreover, section 306 does not affect an area of power traditionally regarded as an integral part of state sovereignty. . . . Power, including the power to tax, over instrumentalities of interstate commerce has not traditionally been limited to the states, and thus is not truly an integral part of state sovereignty. *See United States* v. *Best,* 573 F.2d 1095, 1102-03 (9th Cir. 1978)." Appendix C to this Brief, p.32a-34a.

In *Atchison, Topeka & Santa Fe R.R.,* Arizona also contended, as do the Petitioners here, that Section 306 does not invalidate state property tax schemes which separately classify rail transportation property for ad valorem tax purposes. Arizona argued that if a state maintains or establishes at least one other class of property which is defined under state law to be "commercial and industrial property," and if rail transportation property is treated equally with that class for ad valorem tax purposes, Section 306 is not violated. The Arizona district court and the Ninth Circuit Court of Appeals rejected that contention. Similarly, the alternate contention of the Petitioners in this case that Section 306 is not violated as long as rail transportation property is classified and treated in the same fashion as other "public utility property" under state law, was rejected by the Tennessee district court and the Sixth Circuit Court of Appeals. The decisions of the Tennessee courts on this issue are wholly consistent with those of the Arizona district court and the Ninth Circuit.

In *Alabama Great Southern R.R., supra,* the Alabama Commissioner of Revenue contended (as do the Petitioners in this case) that, because the assessment

lien date set by state law antedated the effective date of Section 306, the provisions of Section 306 did not govern 1979 tax assessments. The Alabama district court (Judge Frank Johnson presiding) rejected this contention and held that, since the *act* of valuing and assessing rail transportation property for the 1979 tax year did not occur under state law until well after February 5, 1979, state officials were required by the supremacy clause of the United States Constitution to comply with Section 306 in making their assessments. The United States Court of Appeals for the Fifth Circuit affirmed Judge Johnson's decision. In this case, the district court and court of appeals also concluded that, since the *act* of valuing and assessing rail transportation property for the 1979 tax year did not occur in Tennessee until well after February 5, 1979, the doctrine of federal supremacy required the Petitioners to comply with the provisions of Section 306 in making their assessments of rail transportation property for the 1979 tax year.

## CONCLUSION

Petitioners have not demonstrated any special or important reason for granting certiorari as required by Rule 17 of the rules of this Court. The decisions of the district court and court of appeals in this case are in accord with the applicable decisions of this Court and with those of other federal courts of appeal on the same matter. Respondents respectfully submit that the petition for writ of certiorari should be denied.

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# APPENDIX A

## APPENDIX A

**LOUISVILLE AND NASHVILLE RAILROAD COMPANY IS A WHOLLY-OWNED SUBSIDIARY OF SEABOARD COAST LINE RAILROAD COMPANY, WHICH, IN TURN, IS WHOLLY-OWNED BY CSX CORPORATION. LOUISVILLE AND NASHVILLE RAILROAD AND SEABOARD COAST LINE RAILROAD JOINTLY OPERATE THE PROPERTIES OF RESPONDENT, CLINCHFIELD RAILROAD COMPANY, UNDER A LONG-TERM LEASE. THE FOLLOWING ARE SUBSIDIARIES AND AFFILIATES OF LOUISVILLE AND NASHVILLE AND CLINCHFIELD RAILROADS:**

Georgia Railroad
Atlanta and West Point Railroad Company
The Western Railway of Alabama
The Carrollton Railroad Company
Chicago and Indianapolis Coal Company, Inc.
Cybernetics & Systems, Inc.
Evansville Connecting Railroad Company
Haysi Railroad Company
Houston-McCord Realty Company
Louisville, Henderson & St. Louis Railway Company
L & N Investment Corporation
Monon Coal Company. Inc.
Monon Realty Company, Inc.
Monon Transportation Corporation
Nashville and Decatur Railroad Company

**SOUTHERN RAILWAY COMPANY IS THE PARENT OF CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, ALABAMA GREAT SOUTHERN RAILROAD COMPANY, CENTRAL OF GEORGIA RAILROAD COMPANY, TENNESSEE ALABAMA AND GEORGIA RAILWAY COMPANY, TENNESSEE RAILWAY COMPANY AND CHATTANOOGA STATION COMPANY. THE SUBSIDIARIES (INCLUDING WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES OF THESE RESPONDENTS ARE:**

Georgia-Southern and Florida Railway Company
Norfolk Southern Railway Company

Atlantic and East Carolina Railway Company
Birmingham Terminal Company
Camp Lejeune Railroad Company
The Georgia Northern Railway Company
Interstate Railroad Company
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
New Orleans Terminal Company
St. Johns River Terminal Company
State University Railroad Company
Airforce Pipeline, Inc.
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlanta Terminal Company
Blue Ridge Railway Company
Charlotte-Southern Corporation
Chattanooga Terminal Railway Company
Citcico Realty Company
Danville and Western Railway Company
Durham and South Carolina Railroad Company
Elberton Southern Railway Company
The Georgia Midland Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Lenoir Car Works
Macon Terminal Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
The National Investment Company
Norfolk Southern Industrial Development Corp.
The North Carolina Midland Railroad Company
Ocean Steamship Company of Savannah
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of Carolina, Inc.
Southern Railway — Carolina Division
Southern Region Coal Transport, Inc.

Southern Region Distribution Services, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Investment Company
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
The South Western Rail Road Company
Terminal Properties, Inc.
Transylvania Railroad Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company
Algers, Winslow and Western Railway Company
Arrowood Corporate Center Associates
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chattanooga Choo-Choo Company
The Cincinnati Union Terminal Company
1575 Eye Street Associates
Fruit Growers Express Company
Kentucky & Indiana Terminal Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
The North Carolina Railroad Company
North Charleston Terminal Company
Pullman Company
Queen City Developers
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
700 North Fairfax Street Limited Partnership
Terminal Railroad Association of St. Louis
Trailer Train Company
Woodstock & Blocton Railway Company

**ILLINOIS CENTRAL GULF RAILROAD COMPANY IS THE WHOLLY-OWNED SUBSIDIARY OF IC INDUSTRIES, INC. THE SUBSIDIARIES AND AFFILIATES OF ILLINOIS CENTRAL GULF RAILROAD COMPANY ARE:**

New Orleans Great Northern Railway Company
IC Products Company
IC Equipment Leasing Co.
IC Leasing, Inc.
Illinois Center Corporation
LaSalle Properties, Inc.
South Properties, Inc.
IC Industries Finance Corporation N.V.
Pet Incorporated
Pepsi-Cola Bottling of Kenosha & Racine
Pepsi-Cola General Bottlers, Inc.
Pepsi-Cola Kantor Bottling Inc.
Dad's Root Beer Company
Bubble Up Company, Inc.
Abex Corporation
Midas International Corporation
Abex Industries Ltd.
Illinois Central Export Corporation
Abex International S.A.
Denison Hydraulics, Japan, Ltd.
Abex Industrial, S.A.
Amsco Mexicana, S.A.
Abex Mead Limited
Abex Industries S.A.
Abex Fluid Power Limited
Abex GmbH
ABex A/S
Abex Industries Aktienbolag
Abex Ges.m.b.H.
Abex Finanziana S.r.L.
Abex Pagid Reibbelag GmbH
Abex Pagid Equipement S.A.
Abex International Holdings Limited

Abex Denision Limited
Frendo Abex A.p.A.
Fren-Do Sud S.p.A.
Danville Pepsi-Cola Bottling Company
Kolmar Products Corporation
Genadco Advertising Agency, Inc.
Pepsi-Cola Bottling Company of Cincinnati
Frolic Homes, Inc.
Huth Manufacturing Corporation
Indiana Trailer Supply, Inc.
International Parts (Canada) Limited
International Stamping Co., Inc.
Ken-Craft Products, Inc.
Midas Automotive Limited
Midas Realty Corporation
Midas Silencers Limited
Muffler Corporation of America
Norris Homes Incorporated
Helvetia Redevelopment Corporation
Hussmann Refrigeration Co.
American Refrigeration Products, S.A.
Hussmann Refrigeration, Inc.
Hussmann Store Equipment Limited
Krack Corporation
Alton Manufacturing Co.
Star Cooler Corp.
Chesley Industries
Merchants Refrigerating Company
Merchants Refrigerating Company of California
Nine-O-Five Stores, Inc.
St. Louis Lithographing Company
Southland Canning & Packing Co., Inc.
Stuckey's, Inc.
Stuckey's Stores, Inc.
Vendome Stores, Inc.
Spartanburg Dairy, Inc.
Applied Air Systems, Inc.

IC Industries Insurance Co. Ltd.
Bolingbrook 55 Corp.

**MISSOURI PACIFIC RAILROAD COMPANY HAS THE FOLLOWING SUBSIDIARIES AND AFFILIATES:**

Alton & Southern Ry.
American Refrigerator Transit Co.
Ark. & Mfs. Ry. Bridge & Term. Co.
Belt Ry. of Chicago
Brownsville & Matamoros Bridge Co.
Chicago Heights Term. Transfer Co.
Chicago & Western Indiana R. R.
Doniphan, Kensett & Searcy Ry. Co.
Fruit Growers Express Co.
Galveston, Houston & Henderson R. R.
Great Southwest R. R.
Houston Belt & Terminal Ry.
Illinois Terminal R. R.
Jefferson Southwestern R. R.
Kansas City Terminal Ry.
Missouri Pacific Truck Lines
Pueblo Union Depot & R. R.
Southern Illinois & Missouri Bridge Co.
Texas City Terminal Ry.
Trailer Train Co.
Weatherford, Mineral Wells & Northwestern Ry.
Texas & Missouri Pacific R. R.
Missouri Improvement Co.
MP Equipment Corp.
Port Terminal R. R. Assn.
Pueblo Union Depot Co.
Terminal R. R. Assn. of St. Louis
Wichita Terminal

**AS A RESULT OF A MERGER EFFECTIVE NOVEMBER 21, 1980, BURLINGTON NORTHERN INC. IS THE SUCCESSOR IN INTEREST TO RESPONDENT ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY. THE SUBSIDIARIES AND AFFILIATES OF BURLINGTON NORTHERN, INC. ARE:**

Arden Lumber Company, Inc.
Burlington Northern Airmotive, Inc.
The Belt Railway Company of Chicago
BN Transport Inc.
BNL Development Corporation
BNT Terminals, Inc.
Burlington Northern Air Freight Inc.
Burlington Northern Dock Corporation
Burlington Equipment Company
Burlington Northern Foundation
Burlington Northern Inc.
Burlington Northern Railroad Company
Burlington Northern (Manitoba) Limited
Butte Pipe Line Company
Camas Prairie Railroad Company
Chicago Union Station Company
Clarkland, Inc.
Clarkland Royalty, Inc.
The Colorado and Southern Railway Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Douglas Transportation Company
Dreyer Bros., Inc.
The Duluth Union Depot and Transfer Company
Fort Worth and Denver Railway Company
Frisco Transportation Company
Galveston Terminal Railway Company
Glacier Park Company
Houston Belt & Terminal Railway Company
International Shipping Services Inc.
Illinois Terminal Railroad Company
Iowa Transfer Railway Company

Kansas City Terminal Railway Company
Keokuk Union Depot Company
Ksanka Lumber Co., Inc.
The Lake Superior Terminal and Transfer Railway Company (of the State of Wisconsin)
Lemhi Telephone Company
Longview Switching Company
The Minnesota Transfer Railway Company
New Mexico and Arizona Land Company
906 Olive Corporation
Northern Radio Ltd.
Northern Resources, Inc.
Northern Rockies Pipe Line Co.
Oregon Electric Railway Company
Paducah & Illinois Railroad Company
Plum Creek Lumber Co.
Portal Pipe Line Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
Quanah, Acme & Pacific Railway Company
Royal Logging Co.
Ruth Realty Company
The Saint Paul Union Depot Company
Saxony Corporation
Terminal Railroad Association of St. Louis
Trailer Train Company
Walla Walla Valley Railway Company
Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company

**EAST TENNESSEE AND WESTERN NORTH CAROLINA RAILROAD COMPANY IS A WHOLLY-OWNED SUBSIDIARY OF SPECTOR RED BALL, INC., WHICH IS, IN TURN, WHOLLY-OWNED BY TELECOM CORPORATION. THE AFFILIATE COMPANIES OF EAST TENNESSEE AND WESTERN NORTH CAROLINA RAILROAD COMPANY ARE:**

Texas Capital Corporation
Speedy Equipment & Supply Corporation
O-O National Brokers, Inc.
Dixie Insurance Agency, Inc.
Dixie "I", Inc.
Spector Freight System of Canada, Ltd.
Spector Terminals, Inc.
Spector Baltimore Terminal, Inc.
Tireco Bandag, Inc.
Red Ball Equipment Co., Inc.
English Realty Co., Inc.
TeleData Systems Corporation
Secured Insurance Corporation
ET&WNC Transportation Company
The Tennolina Corporation, Inc.
Meyer Machine Company
Meyer Systems Corporation
Comfort Supply, Inc.
Corporate Realty '71, Inc.
KA Enterprises, Inc.
Contrux, Inc.

**THE CORINTH AND COUNCE RAILROAD COMPANY IS A SUBSIDIARY OF PACKAGING CORPORATION OF AMERICA WHICH IS, IN TURN, A SUBSIDIARY OF TENNECO CORPORATION, A FIRST TIER SUBSIDIARY OF TENNECO INC. THE AFFILIATES OF THE CORINTH AND COUNCE RAILROAD COMPANY ARE:**

Packaging Corporation of America
ABCO Cartage Company
American Box Board Company
Commonwealth Container Corporation (Pennsylvania)

Detroit Container Corporation
Eastern Corrugated Container Corporation
Mistal Inc.
Northwestern Corrugated Box Company
Packaging Corporation of America (Nevada)
Superior Box and Bag CompanyCompany
Tennessee River Pulp & Paper Company
The Ohio Boxboard Company

**ST. LOUIS SOUTHWESTERN RAILWAY COMPANY IS A SUBSIDIARY OF SOUTHERN PACIFIC TRANSPORTATION COMPANY, WHICH IS, IN TURN, A SUBSIDIARY OF SOUTHERN PACIFIC COMPANY. THE SUBSIDIARIES AND AFFILIATES OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY ARE:**

Arkansas & Memphis Railway Bridge & Terminal Company
Dallas Terminal Railway & Union Depot Company
St. Louis Southwestern Railway Company of Texas
Alton & Southern Railway Company
Southern Illinois & Missouri Bridge Company
Terminal Railroad Association of St. Louis
Trailer Train
Glascar Company
Southwestern Town Lot Corporation
Southwestern Transportation Company

**ARKANSAS & MEMPHIS RAILWAY BRIDGE & TERMINAL COMPANY IS WHOLLY-OWNED BY CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.**

**CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY HAS THE FOLLOWING SUBSIDIARY AND AFFILIATED COMPANIES:**

Arkansas & Memphis Railway Bridge & Terminal Co.
The Belt Railway Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.

Galveston Terminal Ry. Co.
Great Southwest R. R.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R. R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Junction Ry. Co.
Peoria & Bureau Valley R. R. Co.
Peoria Terminal Company
Saint Paul Union Depot Co.
Trailer Train Company
Warren & Ouachita Valley Ry. Co.
Wichita Union Terminal Ry. Co.
Pullman Railroad Company
Rock Island Improvement Co.

# APPENDIX B

## APPENDIX B

## PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

Sec. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"Sec. 28. (1) Notwithstanding the provisions of section 202 (b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive

injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transpor-

tation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation."

# APPENDIX C

## APPENDIX C

STATE OF ARIZONA and ARIZONA DEPARTMENT OF REVENUE,
*Plaintiffs-Appellants,*

v.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY and SOUTHERN PACIFIC TRANSPORTATION COMPANY,
*Defendants-Appellees,*

and

UNITED STATES OF AMERICA,
*Intervenor/Defendant-Appellee.*

Appeal from the United States District Court for the District of Arizona

No. 79-3183.

United States Court of Appeals, Ninth Circuit.

Submitted Jan. 14, 1981.

Decided June 12, 1981.

Before WALLACE and FARRIS, Circuit Judges, and KING,* District Judge.

WALLACE, Circuit Judge:

The State of Arizona and Arizona Department of Revenue (Arizona) brought this action for a declaratory judgment in the district court against the Atchison, Topeka and Santa Fe Railroad Company and the Southern Pacific Transportation Company (the railroads). Arizona sought a declaration that its scheme of assessing property for the purpose of collecting ad valorem property taxes was consistent with section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub.L. 94-210 §306, 90 Stat. 31, 54-55, 94th Cong., 2nd Sess., *reprinted in* [1976] U.S.Code Cong. & Ad.News, p. 14 (the 4R Act) (current version at 49 U.S.C. §11503). In the alternative, Arizona contended that section 306 of the 4R Act was unconstitutional. The district judge

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* Honorable Samuel P. King, United States District Judge, District of Hawaii, sitting by designation.

permitted the United States to intervene as a party defendant. Subsequently, he denied Arizona's motion for summary judgment and granted the railroads' and the United States' motions for summary judgment. Arizona now appeals from this judgment. We affirm.

I

In 1976, Congress passed the 4R Act for the purpose of promoting the revitalization of the railway system of the United States. 4R Act, *supra* §101 (a). Section 306 declared it unlawful, as "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce," 4R Act, *supra*, §306, for a state to assess,

> for purposes of a property tax levied by any taxing district . . . transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

4R Act, *supra*, §306.[1] Although the 4R Act became law on February 5, 1976, the effective date of section 306 was set for three years after that date. *Id.* Section 306 was originally codified at 49 U.S.C. §26c. Before it went into effect, however, Congress recodified the section as part of its revision of the Interstate Commerce Act. Section 306 is now codified at 49 U.S.C. §11503. *See* Pub.L. 95-473 §11503, 92 Stat. 1445, 95th Cong., 2nd Sess., *reprinted in* [1978] U.S.Code Cong. & Ad.News, p. 3009. Although there are some differences between the two codifications, we shall simply refer to "section 306" to mean both versions, and cite to the current codification, except when the differences between the two are at issue.

[1] For convenience, we shall use the shorthand term "assessement ratio" to mean the ratio of assessed value of property for the purpose of property tax to the full cash value of the property.

When this suit was filed, Arizona divided property into seven classes for the purpose of property tax assessment. Class 1, which was assessed at 60% of its full cash value, included railroad property as well as "flight property," property used by private car companies, various mine property, and standing timber. Ariz.Rev.Stat. §§42-136, 42-227 (1978). The other classes of property had lower assessment ratios ranging down to 8% of full cash value. Most, if not all, other commercial and industrial property was contained in class 2, which was assessed at 50% of full cash value, and class 3, which was assessed at 27% of full cash value.[2]

In this case, Arizona seeks a declaration that its property assessment scheme is consistent with section 306. Its position is that section 306 prevents states only from assessing railroad property at a higher ratio than it assesses every other piece of commercial and industrial property. The parties have stipulated that Arizona assessed railroad property at a ratio

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[2] In 1979, Arizona amended its assessment scheme for railroad property, apparently in an attempt to conform to section 306. Arizona made railroad property and private car company property a separate class, and assessed it at a ratio of 36%. Arizona made this provision conditional, however. The provision stated that it "shall be deemed never to have become effective if the provisions of [the 4R Act] §306 . . . are found to be unconstitutional by a federal court of final jurisdiction." S. 1255, Ch. 142, 34th Legis. (1979).

In 1980, the Arizona legislature further amended its assessment scheme, again in an apparent attempt to conform to section 306. Under this scheme, which is still in effect in Arizona, railroad property and property used by private car companies remain a separate class of property, denominated class 7. Ariz. Rev.Stat. §42-136. Class 7 property is assessed at a ratio of 34% for 1980. For years after 1980, class 7 property is to be assessed at a ratio equal to the ratio that "[t]he total assessed valuation . . . of all property in classes 1, 2 and 3 bears to the total full cash value of such property . . . as required by federal law." Ariz.Rev.Stat. §42-227(B)(7).

that exceeds by at least 5% the average assessment ratio of all other commercial and industrial property in the state.[3]

In the alternative, Arizona asserts that section 306 is unconstitutional because it was beyond the power of Congress, acting pursuant to its Commerce Clause power, to enact, and that it violates the Tenth Amendment. Arizona also contends that section 306 impermissibly requires federal courts to assess and levy taxes. We shall discuss these contentions in order after we analyze our jurisdiction to entertain this case.

## II

### A.

Arizona has properly raised a federal question in its complaint. Arizona brought this lawsuit seeking a declaration that its property tax assessment scheme is consistent with section 306 or, in the alternative, that section 306 conflicts with the federal constitution. That the question is within Arizona's well-pleaded complaint for declaratory relief does not, however, necessarily dispose of the jurisdiction issue.

In *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), the Court held that the Declaratory Judgment Act is procedural only, and does not extend the jurisdiction of the federal courts. *Id.* at 671, 70 S.Ct. at 878-79. The plaintiff sought a declaration that a contract was still in effect because a condition of the contract that depended on the action of a federal agency pursuant to federal law had been fulfilled. The Court observed that absent the Declaratory Judgment Act the cause of action would have been one for breach of contract, which would not arise under

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[3] Technically, it is a violation for a state to assign an assessment ratio to railroad property that is any higher than the assessment ratio assigned to other commercial and industrial property. 49 U.S.C. §11503(b)(1). Section 306, however, does not permit a court to grant relief unless the assessment ratio of railroad property exceeds the assessment ratio of other commercial and industrial property by at least 5%. 49 U.S.C. §11503(c).

federal law. The federal law in the case could be invoked only as a defense. Because federal question jurisdiction cannot be invoked when the plaintiff's claim does not contain an element of federal law, but merely anticipates that the defendant will raise a defense under the Constitution or federal law, the Court held that there was no federal question jurisdiction over the declaratory judgment action. *Id.* at 672, 70 S.Ct. at 879. The Supreme Court later observed that

> [w]here the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.

*Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 248, 73 S.Ct. 236, 242, 97 L.Ed. 291 (1952) (dictum).

In essence, the Declaratory Judgment Act allows a plaintiff to bring a suit now when, if there were no such act, the plaintiff would be required to await further events. Although it provides for advanced ripening, it does not create federal jurisdiction over the issue presented. Thus, *Skelly Oil* teaches that we must analyze our jurisdiction in a declaratory judgment action as if the Declaratory Judgment Act did not exist.

The present lawsuit could arise in two different ways if there were no Declaratory Judgment Act. One would be a suit brought by the state pursuant to state law to collect taxes from the railroads. There would be no federal jurisdiction over this case, because the only issue of federal law would be the defense of section 306 that the railroads would raise. It would not be a ground for federal jurisdiction if the state merely anticipated the federal defense and asserted that the defense was not valid. *Louisville & N.R.R.* v. *Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908).

The other way in which this suit could arise is a suit by the railroads to enjoin the state from assessing taxes pursuant to the state's taxation scheme. This case would satisfy the re-

quirements of federal jurisdiction under section 1331 because it would arise under section 306. Section 306 would be the basis asserted by the plaintiffs to have the state taxation scheme enjoined. This cause of action, however, would run afoul of 28 U.S.C. §1341. Section 1341 provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." We have observed that section 1341 is a "jurisdictional bar." *Manael* v. *Hutchinson*, 494 F.2d 364, 366 (9th Cir. 1974). Thus, even though the plaintiff's well-pleaded complaint would bring the case within federal question jurisdiction, section 1341 would divest the federal courts of jurisdiction.

We do not think the policy behind this divestiture of jurisdiction applies to a case such as this one. Section 1341 was designed to eliminate interference by federal courts in state internal economy and taxation matters. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 298-99, 63 S.Ct. 1070, 1073, 87 L.Ed. 1407 (1943). This policy would not be served by applying the statute to bar a state itself from invoking the jurisdiction of the federal courts. In addition, Congress removed the jurisdictional bar of section 1341 for cases brought under section 306 after its effective date.[4] Under these circumstances, the jurisdictional bar of section 1341 cannot apply to this case. Therefore, because there is a federal question raised by the plaintiff in the action that underlies this declaratory judgment action, and the jurisdictional bar of section 1341 does not apply, the federal courts have jurisdiction to hear this case.

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[4] This analysis would have been unnecessary if the action had been filed after the effective date of section 306. Because the action was filed before that effective date, the railroads had to rely on the general federal question jurisdiction pursuant to 28 U.S.C. §1331. Section 306, however, contains its own jurisdictional predicate, and creates an explicit exception to the jurisdictional bar of section 1341. 49 U.S.C. §11503(c).

**B.**

A second jurisdictional problem in this case is whether the issues presented are ripe for adjudication. Arizona filed its lawsuit in the district court on August 16, 1978. Section 306, though enacted on February 5, 1976, was not to become effective until February 5, 1979. Thus, this lawsuit was filed before the effective date of the statute that it was challenging. Such a case runs the risk of being so premature that the issues presented are not sufficiently concrete to present a case or controversy within the meaning of Article III of the United States Constitution. In assessing the problem of ripeness in declaratory judgment cases involving challenges to government regulation that has not yet occurred, the Supreme Court has stated:

> While the courts should not be reluctant or niggardly in granting [a declaratory judgment] in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especialy [sic] in the field of public law. . . . The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

*Public Service Comm'n* v. *Wycoff Co., supra*, 344 U.S. at 243-44, 73 S.Ct. at 240. The Supreme Court has further observed that "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320 (1974). See also *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308-09, 60 L.Ed.2d 895 (1979).

The issues presented in this case are sufficiently concrete and the operation of section 306 against the state so inevitable that we have jurisdiction under Article III. The lawsuit was filed approximately two and one-half years after section 306's passage, and six months before its effective date. One of the purposes of delaying the effective date of section 306 was to permit states that were taxing railroads in a discriminatory fashion to come into compliance with the statute. By the time the lawsuit was filed, the Arizona legislature had not altered its scheme of assessing railroad property in three legislative sessions. There was little likelihood that either Arizona or Congress would substantively alter the statutes over which the parties are in disagreement before the effective date of section 306.[5] In addition, during the first week in August 1978, the railroads informed the state that they intended to avail themselves of the remedies provided in section 306 to prevent discriminatory taxation of railroads when section 306 became effective the following February.

In light of these circumstances, the positions of the parties were sufficiently crystallized by the time of the filing of this lawsuit to create a case or controversy. At that time, it could be realistically concluded that section 306 would come

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[5] Both the federal and state statutes have, in fact, been amended since the filing of this lawsuit. The amendment to section 306, which occurred on October 17, 1978, between the filing of this case and the effective date of the statute, effected no substantive changes pertinent to this lawsuit. *See infra.* Arizona has twice amended its scheme of assessing railroad property in an apparent effort to comply with section 306. *See* footnote 2, *supra.* Neither amendment moots this case. The first amendment provided that if section 306 is declared unconstitutional, the new statute will be deemed never to have come into existence, and the old statute shall be deemed to have remained in force. The second amendment, though arguably bringing Arizona into permanent compliance with section 306 (this question is not before us), does not apply retroactively. Thus, the issue of the proper tax for at least the calendar year 1979 after the February 5, 1979, effective date of section 306, remains at issue.

into effect on February 5, 1979, that the Arizona scheme of assessing railroad property would remain the same, and that the railroads would seek to invoke section 306 to invalidate the Arizona scheme. We agree with the district court that the case was ripe for adjudication when it was filed.

III

Arizona's first contention is that its scheme of assessing railroad property is consistent with section 306. It argues that we should look at section 306 as it was originally passed. *See* 4R Act, *supra,* §306. Arizona asserts that the original language should be used because the recodification of section 306 provides that it merely restates "without substantive change" prior law and that it "may not be construed as making a substantive change in the laws replaced." Pub.L. 95-473, *supra,* §3(a), 92 Stat. 1466. The original version of the statute prohibited states from assigning transportation property at a higher assessment ratio than that assigned to "*all* other commercial and industrial property. . . ." 4R Act, *supra,* §306(1)(a) (emphasis added). In the current version, the word "all" is deleted. 49 U.S.C. §11503(b)(1). Arizona contends, however, that because the amendment effected no substantive change in the statute, we must construe the statute as if the word "all" were still included.

Arizona must make this argument because its statutory construction position depends on an interpretation of the word "all". It contends that section 306 prohibits states only from assigning railroad property a higher assessment ratio than every other form of commercial and industrial property. It asserts that its scheme is consistent with section 306 because, though it places railroad property in the highest assessment ratio class, it also places some other forms of commercial and industrial property in that class. Thus, Arizona concludes that, because it assesses some other property at the same ratio as railroad property, it does not assess railroad property at a ratio higher than all other commercial and industrial property.

The district judge applied the original version of the statute, even though the amendment was passed before his decision. He held, however, that Arizona's interpretation of the word "all" was incorrect. He interpreted "all" to mean "aggregate." Thus, he held that Arizona's assessment scheme was inconsistent with section 306 because railroad property was assessed at a higher ratio rate than the average assessment ratio assigned to all other commercial and industrial property.

Although the meaning of the word "all" in the context of the statute is somewhat ambiguous, the legislative history provides clear support for the district judge's interpretation.[6] The legislative history is clear that Congress understood the term "all other property" to mean property in the aggregate. The pertinent comparison was meant to be between the property of the railroad and that of the "average" taxpayer: "[t]o make the fairest comparison — that of the carrier with the hypothetical 'average' taxpayer — the committee intends that the unit to be used is that of all parcels of property in the district, considered in the aggregate." S.Rep. No. 91-630, 91st Cong., 1st Sess. 10 (1969). Other interpretations were explicitly rejected. The language was not meant to permit railroads to demand the same treatment as those holding property with the lowest assessment ratio, and it was not meant to permit a

[6] Before passing section 306, Congress had considered proposals virtually identical to it since 1961. *Compare* 49 U.S.C. §11503 *with* S.Rep. No. 445, 87th Cong., 1st Sess. 465 (1961). Arizona objects to the consideration of the legislative histories of prior bills, citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-82 n.11, 89 S.Ct. 1794, 1802 n.11, 23 L.Ed.2d 371 (1969), in which the Court stated that "unsuccessful attempts at legislation are not the best of guides to legislative intent." In *Red Lion*, however, none of the prior bills had become law, and the legislative history was inconclusive. In this case, the prior bills are nearly identical to section 306 as it was enacted. The legislative histories of the prior bills are consistent and clear with respect to this point. In ascertaining the intent of Congress, we see no objection to giving some weight to clear legislative histories of prior bills that are identical to the law we are called on to interpret.

state to claim, as Arizona does, that its treatment of railroad property was not discriminatory simply because there was one parcel of property assessed at the same or higher ratio than that of the railroads. *Id.* at 26; S.Rep. No. 1483, 90th Cong., 2d Sess. 23 (1968).

Although the statute standing alone is not unambiguous, it does lend additional, indirect support for the clear interpretation provided by the legislative history. The legislative history contemplates that the average assessment ratio should be proven by the use of a statistical method called the sales assessment ratio study. S.Rep. No. 91-630, *supra,* at 26, 27. The statute explicitly provides that use of this technique is the preferred method of demonstrating the assessment ratio of other commercial and industrial property. 49 U.S.C. §11503(c). This method of proof would be totally unnecessary if, as Arizona contends, the issue was simply whether there was any property with the same or higher assessment ratio as railroad property.[7]

Although we have given Arizona the benefit of the doubt and interpreted the language in the original version, which is arguably more favorable to Arizona, we think it is the amended version that should have been considered by the district judge. The original version of the statute never went into effect. Only the amended version actually became law. *See supra.* The amended version, however, provides even stronger evidence that Arizona's interpretation is incorrect. Arizona's interpretation depends upon its construction of the word "all." By removing the word "all" and stating that it was making no substantive change in the statute, Congress eliminated Arizona's interpretation of the statute. Without the

[7] If Arizona's position were correct, all it would have to do avoid section 306 is point to one other form of commercial or industrial property that was assessed at the same, or higher, ratio than railroad property. There would then be no need to look at the average assessment ratio of all commercial and industrial property. Thus, statutory provision of a method to determine this average would be superfluous.

word "all," there is no argument that Congress meant that railroad property could not have a higher assessment ratio than each and every other kind of property.

Arizona makes two additional points in support of its interpretation of the statute. First, it claims that the comparison between the assessment ratios of railroad property and those of other commercial and industrial properties must take place in many different "assessment jurisdictions" within the State. Arizona contends that if railroads can be assessed at ratios no more than the average ratios within each assessment jurisdiction, then the assessment ratio of railroad property will vary from jurisdiction to jurisdiction depending on what other kinds of property are present within that jurisdiction. This, Arizona asserts, would create "great inequities and utter chaos." The statute, however, defines "assessment jurisdiction" as "a geographical area in a State used in determining the assessed value of property for ad valorem taxation." 49 U.S.C. §11503(a)(2). The Arizona scheme of assessing the value of property is statewide. The state statutes that Arizona claims are consistent with section 306 operate throughout the entire state, and are not limited in their operation to certain local entities. Therefore, we think the "assessment jurisdiction" at issue in the case is the entire State of Arizona, and that Arizona's interpretation that section 306 would create unequal assessments within the state is erroneous. Even if this interpretation were correct, however, it is not sufficient to overcome the clear intent of Congress that railroad property be compared to other commercial and industrial property in the aggregate.

Second, Arizona takes issue with the use by the district court of congressional findings that Arizona was among states that taxed railroads in a discriminatory fashion. *See* S.Rep. No. 91-630, *supra,* at 1, 3-5. Arizona submits that an Arizona Supreme Court case decided subsequent to this congressional finding that upheld Arizona's classification against constitutional attack negated the congressional finding of discrimination. Arizona concludes that because the finding of

discrimination had been overruled, the use of this early legislative history is unreliable and should not be used to support the interpretation of "all other commercial and industrial property." Even if this premise were correct, the conclusion does not follow. That Congress might have been in error about the activities of one particular state does not mean that it was in error about what it intended statutory language to mean.

Arizona's premise is, however, erroneous. The court decision to which it refers is *Apache County* v. *Atchison, T. & S.F.R.R.*, 106 Ariz. 356, 476 P.2d 657 (1970), *app. dism'd*, 401 U.S. 1005, 91 S.Ct. 1257, 28 L.Ed.2d 542 (1971) (*Apache County*). In that case the court rejected claims by the railroads that its property assessment scheme was unconstitutional. The railroads raised three grounds of unconstitutionality: (1) the scheme violated the uniform tax clause of the state constitution; (2) the classification scheme discriminated against and unduly burdened interstate commerce; and (3) the scheme violated the due process clauses of the state and federal constitutions and the equal protection clause of the federal constitution. The court rejected these constitutional claims. Arizona now contends that the court's holding compels the conclusion that the Arizona assessment scheme is non-discriminatory, and that Congress could not have been directing section 306 at that scheme.

This contention is without merit. In the realm of interstate commerce, it is one thing to say that a state statute passes constitutional muster in the absence of congressional legislation, and quite another to say that the same state statute may stand in the face of a conflicting law enacted by Congress. *See Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 1520, 89 L.Ed. 1915 (1945), and discussion *infra*. We shall address in the next section whether Congress overstepped its constitutional limitations in enacting section 306. For the present purpose, however, we need merely say that the decision in *Apache County* has no bearing on what Congress intended in passing section 306. Congress's

power is not limited to curing constitutional defects. It did not need to find that states were unconstitutionally discriminating against railroads before it passed section 306. Its finding of discrimination was a matter of policy. Although *Apache County* may stand for the proposition that states may constitutionally assess railroad property at higher ratios than it assesses other commercial and industrial property, this does not bar Congress, if it is otherwise acting within constitutional boundaries, from determining that states ought not do so. Therefore, *Apache County* does not "overrule" Congress's finding that Arizona was discriminating in its property assessment scheme against railroad property.

## IV

Arizona argues, as an alternative to its statutory construction position, that section 306 is unconstitutional. Arizona contends that Congress lacks the authority to regulate Arizona's power to tax property located entirely within its borders. Arizona further argues that section 306 is an undue impairment of state sovereignty, and thus is unconstitutional under the Tenth Amendment, as interpreted by *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (*National League of Cities*).

### A.

Arizona's argument misconstrues the nature of Congress's power under the Commerce Clause. The cases on which it relies for its proposition that the state power to tax is absolute, involve situations in which Congress had not acted. *See Railroad Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5, 21 L.Ed. 787 (1873); *Nathan* v. *Louisiana*, 49 U.S. 73, 8 How. 73, 12 L.Ed. 993 (1850).[8] When Congress has not acted, the Com-

[8] Arizona also cites *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 19 L.Ed. 101 (1868). *Lane County* is not in point for a different reason. Congress had passed a statute authorizing the use of United States notes for payment of public and private debts. Oregon required that all state and school taxes be paid in gold and silver

merce Clause of its own force acts as some restraint on a state's ability to tax. *Freeman* v. *Hewit*, 329 U.S. 249, 252-53, 67 S.Ct. 274, 276-77, 91 L.Ed. 265 (1946); *see Southern Pacific Co.* v. *Arizona, supra*, 325 U.S. at 769, 65 S.Ct. at 1520. In broad terms, the Commerce Clause restricts states from taxing more than their fair share of interstate commerce or from otherwise discriminating against interstate commerce. *See Norfolk & W. Ry.* v. *Missouri State Tax Comm'n*, 390 U.S. 317, 323, 88 S.Ct. 995, 999, 19 L.Ed.2d 1201 (1968). The Arizona Supreme Court upheld the validity of the Arizona assessment scheme against a Commerce Clause attack prior to the enactment of section 306. In *Apache County, supra*, the court rejected the railroads' claims that the state property tax assessment scheme discriminated against interstate commerce because it resulted in higher assessment ratios for railroads than for most other property. The court observed that the interstate railroads had their property assessed at the same ratio as the property of wholly intrastate railroads. The court concluded that, though distinctions existed in the classifications of various kinds of property, these distinctions were not based on the interstate or intrastate

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coin. Oregon sued Lane County for payment of taxes, in coin, which the county asserted had already been tendered in United States notes. *Id.* at 72. Arizona quotes broad language from the opinion to the effect that the power of the states to tax is free from federal interference. *See id.* at 77. The case does not stand for such a broad proposition. The opinion recognizes that the state taxing power "must not be used so as to burden or embarrass the operations of the national government." *Id.* The case does not address whether the federal government, in the exercise of its Commerce Clause power, may restrict the states from taxing instrumentalities of interstate commerce. Rather, the case is limited in its holding to the proposition that the federal government has no interest in the currency in which a state chooses to collect its own taxes. *Id.* Supreme Court cases decided in the 113 years since *Lane County* confirm our view that Congress is not prevented from using its Commerce Clause power to interfere with at least some aspects of the states' power to tax. *See infra.*

merce that regulation of it is clearly within the scope of Congress's Commerce Clause power. *See United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949); *Wickard* v. *Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942).

Arizona's position that Congress may never interfere with the state power to tax is without merit. The well-known principle of *McCulloch* v. *Maryland*, 17 U.S. 316, 421, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), does not permit such a limitation:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (footnote omitted).

In the case before us, the legitimate end of Congress is to revitalize the nation's railroads to improve the flow of interstate commerce. The means that Congress has adopted, prohibiting states from assessing railroad property at higher ratios than other commercial and industrial property, is "plainly adapted to that end," by having the effect of diminishing the proportionate tax burden on railroads, and is not otherwise prohibited. We know of no authority for the proposition that Congress may not interfere with state taxation in furtherance of its power over interstate commerce. Indeed, the Supreme Court has indicated that Congress has the power to protect interstate commerce from state taxation. *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456, 82 S.Ct. 1380, 1383, 8 L.Ed.2d 620 (1962). *See also Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 150, 99 S.Ct. 1629, 1634, (1979) (*Snead*).

B.

Congress's power to enact section 306 is unaffected by the Tenth Amendment as interpreted by *National League of Cities, supra*. There, the Supreme Court struck down the application of the minimum wage and maximum hour provisions

nature of the property. Thus, the court held that the Commerce Clause was not violated because there was no discrimination against interstate commerce. It was not argued that Arizona was taxing property that was attributable to out of state operations. *Apache County, supra,* 106 Ariz. at 361-62, 476 P.2d at 662-63.

In this case, we do not deal with the validity of a state tax under the Commerce Clause. Neither apportionment of property for tax purposes among several states nor discriminatory taxing, in the constitutional sense, are issues in this case. Rather, we must determine whether Congress has properly exercised its positive Commerce Clause power. In making this determination, it is totally irrelevant whether Arizona's tax is otherwise constitutional:

> Congress had undoubted power to redefine the distribution of power over interstate commerce. It may either permit these states to regulate the commerce in a manner which would otherwise not be permissible, . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.

*Southern Pacific Co.* v. *Arizona, supra,* 325 U.S. at 769, 65 S.Ct. at 1520 (citations omitted).

The power of Congress to regulate interstate commerce is unmistakably broad. Congress may regulate any activities except " 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.' " *Katzenbach* v. *McClung,* 379 U.S. 294, 302, 85 S.Ct. 377, 383, 13 L.Ed.2d 290 (1964), *quoting Gibbons* v. *Ogden,* 22 U.S. 1, 86, 9 Wheat. 1, 195, 6 L.Ed. 23 (1824). Although Arizona contends that the railroad property in question is purely local in character, and thus immune from Congress's Commerce Clause power, state taxation of property situated totally within one state that is used by an interstate railroad so greatly affects interstate com-

of the Fair Labor Standards Act to employees of the states and their various political subdivisions. The Court stated the issue in the case as whether the terms and conditions of employment of state employees are " 'functions essential to separate and independent existence' . . . so that Congress may not abrogate the States' otherwise plenary authority to make them." *National League of Cities, supra,* 426 U.S. at 845-46, 96 S.Ct. at 2471, *quoting Lane County* v. *Oregon,* 74 U.S. (7 Wall.) 71, 76, 19 L.Ed. 101 (1868). The Court emphasized that the federal law imposed increased costs on local governments, forced local governments to curtail important programs, and "displace[d] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *Id.* at 847, 96 S.Ct. at 2472. The Court concluded that "Congress [had] sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system. . . .' " *Id.* at 852, 96 S.Ct. at 2474, *quoting Fry* v. *United States,* 421 U.S. 542, 547 n.7, 95 S.Ct. 1792, 1795 n.7, 44 L.Ed.2d 363 (1975). Justice Blackmun joined the 5-4 majority in *National League of Cities* with the understanding that the Court was adopting a balancing approach between state and federal interests. *National League of Cities, supra,* 426 U.S. at 856, 96 S.Ct. at _____ (Blackmun, J., concurring).

Whether or not Justice Blackmun is correct in his interpretation of *National League of Cities,* that case does not require us to invalidate section 306. Section 306 requires no change in structure of state government. *See Friends of the Earth* v. *Carey,* 552 F.2d 25, 38 (2d Cir.), *cert. denied,* 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977). It does not require the states to alter or abolish any state programs or services. It does not displace state policy in the determination of the performance of basic governmental services. Indeed, it may not even cost the state money, in terms of decreased tax revenues. At most, section 306 requires states to alter their tax

structures so that railroad property is assessed at a ratio no higher than that of other commercial and industrial property.[9]

Moreover, section 306 does not affect an area of power traditionally regarded as an integral part of state sovereignty. The Court in *National League of Cities* indicated that one of the cases that remained valid after *National League of Cities* was *United States* v. *California,* 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936).[10] In that case, California's operation of a railroad, which was engaged in interstate commerce, was held subject to federal regulation. The Court in *National League of Cities* indicated that this was not "an area that the States have regarded as integral parts of their governmental activities," *National League of Cities, supra,* 426 U.S. at 854 n.18, 96 S.Ct. at 2475 n.18, and was therefore subject to congressional regulation. *Cf. United Transp. Union* v. *Long I.R.R. Co.,* 634 F.2d 19, 26 (2d Cir. 1980) (distinguishing *United States* v. *California* to hold that state operation of a passenger, as opposed to a freight, railroad is an integral government function). By the same token, although assessment of property tax might otherwise arguably be an integral part of a state's governmental activities, no state could reasonably expect that its taxation of an instrumentality of interstate commerce was immune from congressional regulation. Power, including the power to tax, over instrumentalities of interstate commerce has not traditionally been limited to the

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[9] On its face, section 306 does not require states to reduce taxes or even to reduce the assessment ratio of railroad property. We assume that states could comply with section 306 by raiding the ratios of other properties in order to make the assessment ratio of railroad property not exceed that of the aggregate of other commercial and industrial property. The more likely possibility is that states will reduce the assessment ratio of railroad property and make up the lost revenue by increasing the assessment ratios of other properties, or by some method independent of property tax assessment.

[10] The only case expressly overruled by *National League of Cities* was *Maryland* v. *Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

states, and thus is not truly an integral part of state sovereignty. *See United States* v. *Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978).

A similar analysis is appropriate under Justice Blackmun's balancing approach. In *National League of Cities* the state interest outweighed the federal interest because of the severe burdens imposed on the states by the federal regulation, and the minimal effect of the statute on interstate commerce. In the case before us, however, the burden on the state is small in comparison to the benefit to interstate commerce. Congress enacted section 306 as a measure to assist the troubled railroad industry. The federal government has a strong and legitimate interest in supporting the railroad industry to enhance interstate commerce and travel. The burden on the states in altering their assessment schemes is slight. Therefore, the balance tips in favor of the federal interest, and the legislation may stand.

C.

The views that we have expressed concerning the constitutionality of section 306 are confirmed by the Supreme Court's opinion in *Snead, supra*. In *Snead,* Congress passed a statute that prohibited states from assessing any tax on the generation of electricity that discriminated against out of state producers, sellers, or users. Congress determined that a tax was discriminatory if it resulted, directly or indirectly, in a greater tax burden on interstate electricity than on intrastate electricity. *Snead, supra,* 441 U.S. at 146, 99 S.Ct. at 1632. The State of New Mexico imposed a tax on the generation of electricity. The tax rate was the same for electricity consumed in state as it was for that consumed out of state. The state, however, permitted that tax to be credited against its gross receipts tax. Because the gross receipts tax was imposed only against electricity consumed within New Mexico's borders, the effect was that the generation tax fell more heavily on electricity generated out of state than on that generated in state. New Mexico argued that the statute was "sterile" — that is, that

the statute prohibited no more than the Commerce Clause by itself would prohibit. Using Commerce Clause analysis, New Mexico argued that the generation tax did not discriminate against interstate commerce because the total tax burden on power sold within the state was greater than that on power sold outside of the state, taking into account the gross receipts tax. The Court rejected this analysis. It observed that Congress had intended that the provision go further than the Commerce Clause would have by itself. The Court held that the New Mexico tax violated the statute because the statute prohibited *any* tax that discriminated against out of state use, not merely discriminatory tax structures as a whole. *Id.* at 149, 99 S.Ct. at 1634. Having determined that New Mexico's tax violated the federal statute, the Court held the statute constitutional. It observed that Congress has a broad power under the Commerce Clause: "Congress had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate interference. The legislation thus was within the constitutional power of Congress to enact." *Id.* at 150, 99 S.Ct. at 1634. Justice Rehnquist filed a separate concurring opinion, indicating that he thought the New Mexico tax would be valid under the Commerce Clause absent the federal statute. *Id.* at 152n. *, 99 S.Ct. at 1635 n. *. (Rehnquist, J., concurring).

*Snead* is instructive on both of Arizona's constitutional arguments. First, it indicates that Congress may use its Commerce Clause power to curtail the power of a state to tax. Although the case was decided three years after *National League of Cities,* neither the majority opinion nor Justice Rehnquist's concurring opinion cites *National League of Cities.* Thus, it is apparent that the Court did not see *National League of Cities* as a limitation on Congress's ability to use its Commerce Clause power to impair state taxation of subjects of interstate commerce.

Second, *Snead* illustrates the distinction between the negative and positive implications of the Commerce Clause. Although the majority offered no view concerning the validity

of the New Mexico tax under the Commerce Clause standing alone, it found it necessary to determine whether the federal statute was a broader prohibition of state power than the Commerce Clause alone was. Justice Rehnquist indicated his belief that the statute would survive Commerce Clause scrutiny absent federal legislation. Thus, *Snead* confirms that there is no merit to Arizona's argument in the case before us that Congress may not use its Commerce Clause power to interfere with a state tax that has already been held constitutional against a Commerce Clause attack. Congress has the power, under the Commerce Clause, to regulate state activity that would otherwise be permissible under the Commerce Clause. Congress may, as it has done here, prohibit a state taxing scheme that it finds, as a matter of policy, discriminatory against interstate commerce, even though that scheme is not discriminatory in a constitutional sense. *Cf. State Bd. of Ins.* v. *Todd Shipyards, supra,* 370 U.S. at 456, 82 S.Ct. at 1384 (Congress's power to protect "interstate commerce against state regulation or taxation . . . is so complete that its ideas of policy should prevail." (citations and footnote omitted)).

We conclude that section 306 is a valid exercise of Congress's Commerce Clause power. It is designed to assist an instrumentality of interstate commerce, and is a reasonable method of doing so. It does not unduly impinge on the sovereignty of Arizona, and thus does not fall within the proscription of *National League of Cities.*

V

Arizona's final contention is that section 306 impermissibly requires federal courts to assess and levy taxes in violation of the holding of *Moses Lake Homes, Inc.* v. *Grant County,* 365 U.S. 744, 81 S.Ct. 870, 6 L.Ed.2d 66 (1961). In that case, the Supreme Court held that a federal court may not make the adjustment necessary to make an invalid state tax valid. The courts are limited to determining whether existing taxes are valid, and have no power to substitute a valid tax for the invalid tax. *Id.* at 751-52, 81 S.Ct. 874.

Section 306, as it was originally enacted, appears to have prohibited only that portion of an assessment that was excessive. The statute prohibited "[t]he assessment (but only to the extent of any portion based on excessive values as hereinafter described). . . ." 4R Act, *supra*, §306. We do not need to interpret this language, however, or to analyze *Moses Lake Homes, Inc.* v. *Grant County, supra*, as it may bear on these words. When section 306 was recodified, this language was deleted. No comparable language currently appears in the statute. As we have observed, only the recodification of section 306 ever went into effect. It is not necessary to interpret language in a statute that never went into effect, when there is no language in the current statute that may lend itself to the interpretation put forward by Arizona.

VI

We conclude, then, that the district court was correct in granting summary judgments against Arizona. The only error that we perceive is that the district judge improperly applied the old statute, 4R Act, *supra*, §306, rather than the new statute, 49 U.S.C. §11503. As we have seen, however, this did not affect the outcome of the case. We hold, therefore, that there was federal court jurisdiction to entertain this declaratory judgment action, that Arizona's scheme for assessing property for ad valorem tax purposes was not consistent with section 306, and that section 306 was enacted pursuant to a valid exercise of Congress's Commerce Clause power.

AFFIRMED.

SAMUEL P. KING, Chief Judge, dissenting:

I respectfully dissent from the conclusion that federal jurisdiction lies in the posture of this case. The plaintiff is the State of Arizona, not the railroad. The only federal question that the State of Arizona raises is the anticipated defense of the railroad based upon a federal statute. This is squarely within the holding of *Louisville & N.R.R.* v. *Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

*Mottley* interpreted what is now 28 U.S.C. §1331 and, though the *Mottley* result was not constitutionally mandated, Congress has not amended section 1331 to remove the *Mottley* limitation. The jurisdiction provision of the 4R Act, 49 U.S.C. §11503(c), does not enact a special exception to *Mottley*. The granted nonexclusive jurisdiction is "to prevent a violation of subsection (b) of this section." The earlier version, 49 U.S.C. §26c (Title III, §306, of Pub.L. 94-210), also gave nonexclusive jurisdiction only "to grant such mandatory or prohibitive injunctive relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section," with exceptions. The State of Arizona's claims are not brought to prevent a violation of the Act, but rather to obtain a declaratory judgment as to a claim for which there is no underlying case or controversy.

Furthermore, even if there was a case or controversy under the earlier Arizona statute, that statute has been amended to conform to the federal statute. Hence, that issue is now moot unless the railroad sues for any taxes that might have been collected under the earlier statute. Under the present Arizona statute, there is no case or controversy.

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No. 80-2141

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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STATE OF TENNESSEE, ET AL., PETITIONERS

*v.*

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. III) 11503, which prohibits states from taxing or assessing railroad property at levels significantly higher than other commercial and industrial property, requires the State of Tennessee to alter the taxing scheme it applies to railroad property within that state.

2. Whether Section 306 of the Act is a proper exercise of Congress' power to regulate interstate commerce.

3. Whether Section 306 of the Act violates the Tenth Amendment.

4. Whether Section 306 of the Act was intended by Congress to apply to the 1979 tax year.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A-1 to A-2) is unreported. The opinion of the district court (Pet. Supp. App. A-1 to A-23) is reported at 478 F. Supp. 199.

### JURISDICTION

The judgment of the court of appeals was entered on March 20, 1981 (Pet. App. A-1). The petition for a writ of certiorari was filed on June 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are reprinted at Pet. App. A-17 to A-28.

## STATEMENT

1. Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Section 101(a), 45 U.S.C. 801:

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy * * *.

A primary cause of the economic difficulties of the nation's railway system was discriminatory taxation of railroad properties by state taxing authorities. The problem was described clearly by the House Committee that reported the Act as follows:

> [R]ailroads are over-taxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property * * * taxation should be ended.[1]

H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 78 (1975).

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[1] Congress has stated that discrimination against railroads through onerous property taxes "has long been a well-recognized problem." H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 76 (1975). See also S. Rep. No. 92-1085, 92d Cong., 2d Sess. 4 (1972); S. Rep. No. 1483, 90th Cong., 2d Sess. 4 (1968); S. Rep. No. 445, 87th Cong., 1st Sess. 462 (1961).

Section 306 of the Act was adopted to eliminate this problem. Among other things, it prohibits states from assessing "rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." 49 U.S.C. (Supp. III) 11503(b)(1). In order to ease the effect on state revenues that Section 306 might cause, Congress delayed the effective date of the provision for three years until February 5, 1979. This lead time was intended to allow "the twenty-one or more states likely to be affected to change their practices." H.R. Rep. No. 94-725, *supra*, at 76.

At the time of the adoption of the Act, the State of Tennessee assessed "public utility property" at "fifty-five percent of its value" (Tenn. Const., Art. II, § 28), and other "industrial and commercial property" at forty or thirty percent (*ibid.*). The state legislature classified railroad company property as "public utility property." Tenn. Code Ann. § 67-601 (7)(1) (repl. 1976).

2. Instead of changing the classification of railroad property to "industrial and commercial property," the State and various public officials (petitioners herein) filed this suit against seventeen railroad companies in the United States District Court for the Middle District of Tennessee. They requested a "declaratory judgment * * * that section 306 * * * is compatible with Tennessee's property tax classification system" or "[i]n the alternative, * * * that section 306 is unconstitutional on the grounds that Congress exceeded its power under the Commerce

Clause * * * as limited by the Tenth Amendment" (Pet. Supp. App. A-2 to A-3). Petitioners also contended, in the alternative, that even if the Act was constitutional and required the State to change its taxing scheme, it was not intended to apply to the 1979 tax year (*id.* at A-19).

The United States was allowed to intervene to defend the constitutionality of Section 306 of the Act. The United States and the railroad companies filed counterclaims seeking, *inter alia*, a declaration that the Tennessee property tax as applied to the railroads was contrary to Section 306 and therefore was void (Pet. Supp. App. A-4). The United States and the railroad companies also contended that Section 306 was intended to apply to the 1979 tax year (*id.* at A-19).

All parties filed cross motions for summary judgment (Pet. Supp. App. A-4). The district court granted defendants' motions, denied petitioners' motions, and entered judgment for defendants (*id.* at A-1 to A-2). The district court held: (1) Tennessee's property tax classification scheme plainly violated Section 306 (Pet. Supp. App. A-4 to A-6); (2) Section 306 did not violate the Tenth Amendment as interpreted by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (Pet. Supp. App. A-6 to A-16); (3) Section 306 was a permissible exercise of Congress' Commerce Clause powers (Art. I, Sec. 8, Cl. 3) (Pet. Supp. App. A-16 to A-19); and (4) Congress intended Section 306 to take effect in the 1979 tax year (Pet. Supp. App. A-19 to A-21).

The court of appeals "affirmed for the reasons set forth in the opinion of the District Court" (Pet. App. A-2).

## ARGUMENT

1. Petitioners invite this Court (Pet. 16) to avoid addressing their constitutional arguments by construing Section 306 to allow Tennessee to continue assessing railroad property at the same ratio that it assesses property of other public utilities (Pet. 14-16). Petitioners ignore, however, their burden to show that this interpretation of the statute is at least "fairly possible." *Machinists* v. *Street*, 367 U.S. 740, 749 (1961), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); see also *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926). The statutory language is unambiguous in requiring rail property to be assessed at the same ratio as "commercial and industrial property." 49 U.S.C. (Supp. III) 11503(b)(1). Nothing in this language supports the limiting construction suggested by petitioners. See *Arizona* v. *Atchison, T. & S.F. Ry.*, No. 79-3183 (9th Cir. June 12, 1981), slip op. 2856. Moreover, as the district court's opinion demonstrates (Pet. Supp. App. A-6), the legislative history "leaves no doubt but that the federal law would serve to abrogate Tennessee's classification scheme."[2]

2. Petitioners argue (Pet. 12-14) that Section 306 is an improper exercise of Congress' power to regulate interstate commerce. To determine whether the statute is within the commerce power, petitioners urge this Court to apply the two-part test announced in *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294,

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[2] Senator Baker of Tennessee opposed Section 306 on the ground that its adoption "will require the State of Tennessee to reduce the level of assessment of railroads and other interstate carriers from 55 percent to 40 percent." 121 Cong. Rec. 42205 (1975). See also *id.* at 36092 (remarks by Sen. Baker).

1300 (N.D. Cal. 1977). Under this test, a court must decide whether Congress rationally concluded that a given activity adversely affects interstate commerce and whether Congress has adopted a reasonable means to eliminate the effect of that activity on interstate commerce. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964).

Assuming, for purposes of argument, that this is a proper formulation of the constitutional standard, it is clear that Section 306 satisfies both elements. First, even though the railroad property in question is inside the State of Tennessee, it is part of an interstate railway system and therefore the State's tax does have a significant effect on interstate commerce. *Perez* v. *United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel* v. *United States*, *supra*; *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Second, Congress' legislative findings regarding the effect of discriminatory state taxes on railroads (see page 2, *supra*) demonstrate, contrary to petitioners' assertion (Pet. 13), that the reduction of these state taxes is a reasonably necessary means to protect this essential form of interstate commerce. Courts have no power to second guess such congressional determinations. See *Stafford* v. *Wallace*, 258 U.S. 495, 521 (1922). To the extent any advantage is thereby given to railroads over other common carriers, this was a permissible response by Congress to the special problems of the nation's railway systems.

3. Nor did Congress violate the Tenth Amendment of the Constitution as interpreted in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). This Court has repeatedly recognized that Congress has broad

power to limit state taxation that affects interstate commerce. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979); *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 280 (1978); *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962); *Freeman* v. *Hewit*, 329 U.S. 249 (1946); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944).[3]

This Court has not, however, indicated what, if any, limits the Tenth Amendment places on Congress' power to regulate taxation of interstate commerce. That some limit may exist was suggested in dicta in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 434 (1946) (emphasis added), where the Court described Congress' power over commerce in the following terms:

> That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and *the requirement*

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[3] Justice Jackson's concurring opinion in *Northwest Airlines* emphasizes Congress' nearly absolute control over the taxation of interstate commerce (322 U.S. at 303-304):

> Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether.

*that it shall not invade the domains of action reserved exclusively for the states.*

Moreover, regulation of state taxing schemes might arguably satisfy the threshold requirements for a Tenth Amendment claim announced in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), slip op. 21.

Even assuming that these threshold requirements are satisfied, however, this Court made clear in *Hodel* that a Tenth Amendment challenge cannot succeed in a case such as this. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21 n.29. The necessary process of balancing state and federal interests demonstrates the permissibility of federal regulation here. See *Fry* v. *United States*, 421 U.S. 542 (1975); *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 856 (Blackmun, J., concurring).

The district court carefully balanced the relevant state and federal interests before holding Section 306 was constitutional. It recognized a strong federal interest in revitalizing the nation's railroad system, which was in a crisis situation. It found the State's interest to be less weighty in view of the fact that Section 306 is limited to lowering assessments, not eliminating taxes. Moreover, the provision applies to only one type of property. See *Freeman* v. *Hewit*, *supra*, 329 U.S. at 253. Thus, Section 306 in no way undermines the State's ability to collect revenues from other sources or forbids the state to increase railroad assessments so long as the State treats railroad and industrial and commercial property alike. The district court's analysis is fully consistent with *National League of Cities* v. *Usery*, *supra*, and with the only other court of appeals' decision on this issue.

*Arizona* v. *Atchison, T. & S.F. Ry.*, *supra*, slip op. 2859-2861.

Petitioners also appear to argue (Pet. 10) that Congress cannot invalidate the Tennessee tax because the only limitations upon Tennessee's taxation powers are those "contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and [imposed] by the prohibition of taxing interstate commerce under the Commerce Clause," and that "Tennessee's system of taxing railroads has been constitutionally upheld" in *Louisville & N. R.R.* v. *Atkins*, 390 F. Supp. 576 (M.D. Tenn. 1975). However, petitioners cite nothing to support their novel contention that Congress, in the exercise of its Commerce Clause power, may do no more than eliminate those state-imposed burdens on interstate commerce that independently violate the implied limitations on state taxation in the Commerce Clause. As the Ninth Circuit held in *Arizona* v. *Atchison, T. & S.F. Ry.*, *supra*, slip op. 2857:

> In the realm of interstate commerce, it is one thing to say that a state statute passes constitutional muster in the absence of congressional legislation, and quite another to say that the same state statute may stand in the face of a conflicting law enacted by Congress. * * * Congress's power is not limited to curing constitutional defects.

See also *Arizona Public Service Co.* v. *Snead*, *supra*, 441 U.S. at 151-152 (Rehnquist, J., concurring).

4. Finally, petitioners maintain (Pet. 16-18) that Section 306 was not intended to apply to the 1979 tax year, since the February 5, 1979, effective date falls after Tennessee's January 1 completion of the 1979 tax year assessment process (Pet. Supp. App.

A-19). The courts below correctly rejected that contention (Pet. App. A-2; Pet. Supp. App. A-21), as did the only other court to have considered the same question. See *Alabama Great Southern R.R.* v. *Eagerton*, 472 F. Supp. 60 (D. Ala. 1979).

As the district court explained (Pet. Supp. App. A-21):

> To make section 306 applicable for the first time to the 1980 tax year for which taxes are not due until 1981, more than five years after the enactment of section 306, and more than two years after its effective date, is contrary to the three-year phase-in plan of Congress. Such a construction frustrates the congressional purpose in fixing the effective date of section 306.

The district court's analysis of this question, which may be unique to Tennessee and Alabama and affects only a single taxable year, is reasonable and does not warrant further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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